SUPREME COURT, U. S.

MAR 18 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,
Appellants,

v.

WARREN E. SPAHN,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

SELIG J. LEVITAN,
Attorney for Appellants,
630 Fifth Avenue,
New York, New York 10020

INDEX

	PAGE
Jurisdictional Statement	1
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Question Presented	4
Statement of the Case	4
How the Federal Question is Presented	8
The Question Is Substantial	8
A. The New York law does not now require proof and a finding of intentional or reckless falsification, for application of Section 51 of the Civil Rights Law to restrain publication of an unauthorized biography of a public figure	9
B. "Fictionalization" is too vague a standard for denial of constitutional protection	12
Conclusion	17
Appendices:	
A. Judgment Appealed From	1a
B. Opinion of the Court of Appeals	1b
C. Opinion of Appellate Division	1c
D. Opinion of the Trial Court	1d
E. Order of Trial Court denying exemplary damages	1e
F. Table of Comparison between References in the book and Appellee's oral testimony	1f

TABLE OF AUTHORITIES

Cases	PAGE
Binns v. *Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913)	14
Bridges v. *California*, 314 U. S. 252, 86 L. Ed. 192 (1941)	16
Joseph Burstyn, Inc. v. *Wilson*, 343 U. S. 495, 96 L. Ed. 1098 (1952)	14
Chaplinsky v. *New Hampshire*, 315 U. S. 568, 86 L. Ed. 1031 (1942)	17
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239 (1921)	2
Dombrowski v. *Pfister*, 380 U. S. 479, 14 L. Ed. 2d 22 (1965)	10
Donahue v. *Warner Bros. Pictures Dist. Corp.*, 2 Utah 2d 256, 272 P. 2d 177 (1954)	13, 19
Garrison v. *Louisiana*, 379 U. S. 64, 13 L. Ed. 2d 125	2
Hill v. *Hayes*, 15 N. Y. 2d 986, 207 N. E. 2d 604 (1965)	13, 14
Koussevitzky v. *Allen, Towne & Heath*, 188 Misc. 479, 68 N. Y. Supp. 2d 779, affd. 272 App. Div. 759, 69 N. Y. Supp. 2d 432 (1947)	13
Krieger v. *Popular Publications, Inc.*, 167 Misc. 5, 3 N. Y. Supp. 2d 480 (1938)	14
N. A. A. C. P. v. *Button*, 371 U. S. 415, 9 L. Ed. 2d 405 (1963)	17
New York Times Co. v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686 (1964)	12

PAGE

Roberson v. *Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902) 13
Rosemont Enterprises, Inc. v. *Random House, Inc.*, 261 F. Supp. 691 (1966) 11
Roth v. *U. S.*, 354 U. S. 476, 1 L. Ed. 2d 1498 (1957) 19

Smith v. *California*, 361 U. S. 147, 4 L. Ed. 2d 205 (1959) 17
Sutton v. *Hearst Corp.*, 277 App. Div. 155, 98 N. Y. Supp. 2d 233 (1950) 9

Thompson v. *Close-Up, Inc.*, 277 App. Div. 848, 98 N. Y. Supp. 2d 300 (1950) 12
Time, Inc. v. *Hill*, — U. S. —, 17 L. Ed. 2d 456 (1967) 2, 9, 11, 16
Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254 (1921) ..... 7 fn.

Winters v. *New York*, 333 U. S. 507, 92 L. Ed. 840 (1948) 16

Youssoupoff v. *Columbia Broadcasting System, Inc.*, 48 Misc. 2d 700, 265 N. Y. Supp. 2d 754 (1965) 12

UNITED STATES CONSTITUTION

Amendment I 3

Amendment XIV § 1 3

NEW YORK STATUTES

Section 50, New York Civil Rights Law 3

Section 51, New York Civil Rights Law 3

MISCELLANEOUS

Hofstadter & Horowitz, *The Right of Privacy* (1964) 13
Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) 13, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,
Appellants,

against

WARREN E. SPAHN,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdictional Statement

Appellants appeal from a judgment of the Court of Appeals of the State of New York, entered on October 27, 1966, affirming a judgment of the Appellate Division of the Supreme Court, which had affirmed a judgment of the trial court in favor of Appellee.

Opinions Below

The judgment of the New York Court of Appeals appealed from is set forth in Appendix A, and the Opinion of that court, reported at 18 N. Y. 2d 324, 221 N. E. 2d 543, 274 N. Y. Supp. 2d 877 (1966), in Appendix B. The Opinion of the Appellate Division, reported at 23 App. Div.

2d 216, 260 N. Y. Supp. 2d 451 (1965), is set forth in Appendix C. The opinion of the trial court, reported at 43 Misc. 2d 219, 250 N. Y. Supp. 2d 529 (1964), is set forth in Appendix D. An order of the trial court, denying Appellee's motion for exemplary damages and interest, is set forth in Appendix E.

Jurisdiction

This action for damages and an injunction for invasion of privacy was brought against the author and publisher under Sections 50 and 51 of the New York Civil Rights Law. Tried before a court without a jury, it resulted in a judgment of $10,000 compensatory damages and an injunction against further publication; Appellee's post-trial motion to amend the judgment to allow exemplary damages and interest was denied. Both sides appealed, Appellants from the judgment and Appellee from the denial of greater compensatory damages, exemplary damages and interest. The Appellate Division affirmed in all respects the determinations of the trial court, and this judgment was affirmed by the New York Court of Appeals, the court below, by its judgment entered October 27, 1966. Notice of Appeal to this Court from that judgment was filed January 20, 1967, in Supreme Court, New York County. The jurisdiction of this Court to review the judgment below is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c). The following decisions sustain the jurisdiction of the Court to review on appeal the judgment below:

Garrison v. *Louisiana*, 379 U. S. 64, 13 L. Ed. 2d 125 (1964);

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239 (1921);

Time, Inc. v. *Hill*, — U. S. —, 17 L. Ed. 2d 456 (1967).

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the First and Fourteenth Amendments, U. S. Const. Amend. I, Amend. XIV § 1.

The statutory provisions involved are Sections 50 and 51 of the New York Civil Rights Law:

"§ 50. RIGHT OF PRIVACY.

"A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."

"§ 51. ACTION FOR INJUNCTION AND FOR DAMAGES.

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection there-

with; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith."

Question Presented

Whether Section 51 of the New York Civil Rights Law abridges the freedom of the press guaranteed by the First and Fourteenth Amendments when construed to permit damages and an injunction against both the author and the publisher of THE WARREN SPAHN STORY, a non-defamatory biography of a public figure designed for juvenile readers,

(a) where the author used constructed dialogue, imaginary incidents and attributed thoughts and feelings, based substantially on material previously published in reputable secondary sources, as appropriate literary techniques for such an audience;

(b) but absent any determination that either the author or the publisher published the biography with "knowledge of its falsity or in reckless disregard of the truth."

Statement of the Case

Appellee, a well known professional baseball player, on July 28, 1958, commenced an action for an injunction and damages against the author and publisher of THE WARREN SPAHN STORY, a biography written for juvenile readers, on the grounds that the publication was unauthorized, contained many untrue statements and conjectures, and fictionalized and novelized his life story for the purpose of taking pecuniary advantage of his name, photograph and likeness for profit, all in violation of Sections 50 and 51 of the New York Civil Rights Law.

THE WARREN SPAHN STORY is one of a series of more than three hundred biographies for children, known as the Messner Shelf of Biographies; thirty-two are biographies

of sports characters, addressed to teen-age children. An expert witness, called by Appellee, wrote that children's biographies "sometimes make use of imaginary incidents and manufactured dialogue that a respectable author would never include in a work for mature readers, but there can be no objection if these devices heighten interest and clarify complex issues" (R. 187, Defendants' Exh. B),* and testified that THE WARREN SPAHN STORY is written in a style similar to other children's biographies (R. 147). An expert witness called by Appellants testified that in writing biography for children "You have to make a lively story of a biography. You cannot make it straight narrative * * * It's mandatory. If you don't have dialogue, the thing doesn't come to life. You just have narrative" (R. 786, 787).

Appellee's status as a public figure was conceded. He had actively sought publicity over a period of twenty years; his contract with the baseball club by which he was employed gave it the right freely to use his name and picture for publicity purposes in any way the club wished (R. 201); he had appeared in hundreds of television broadcasts, thousands of radio broadcasts, and he and his family had been portrayed in numerous pictures, still and movie; he and his wife were often interviewed for publication purposes (R. 415, 418, 455, 456-8). Photographs of him, and photographs of him with his family, had been posed for and taken with his and his wife's consent for publicity purposes and public dissemination (R. 224 et seq., 474, 475). He consented to the use of his name and likeness to advertise and sell such diverse commodities as chewing gum, cigarettes, oil and gasoline, electric razors, dairy products, breakfast cereal and automobile tires (R. 198 et seq.); he authorized use of his picture on Railway Express trucks (R. 201). His name appeared as author of an article about himself which was published in the Saturday Evening Post (R. 258).

* All record references are to the Appendix Record in the New York Court of Appeals.

The author of THE WARREN SPAHN STORY, Appellant Shapiro, an experienced writer of biographies for children, testified that newspaper articles, magazine stories, including articles of which Appellee was a purported author, and general background books constituted the prinicipal research sources for the work (R. 626).

Appellee himself testified that the magazine articles published in 1950 and 1953, which included details of his courtship and marriage, were based on interviews with him and were substantially true, but that a Saturday Evening Post article, a Boston Globe article, and an article in Colliers Magazine (all used as sources by Appellant Shapiro), on which his own name appeared as author, contained untrue matter (R. 268; 328-332; 398).

Appellee also testified that he had autographed many copies of THE WARREN SPAHN STORY throughout the country (R. 96, 105), although, as the consequences of the publication of the book, he had felt "somewhat of an embarrassment" (R. 94) and had been subjected to some ribbing by colleagues.

The book follows Appellee's life in broad outline, making use throughout of invented dialogue—which Appellee claimed was "untrue" because the words published had not or may not have been uttered—and also some imaginary embellishments for the purpose of more effective presentation of the material to the audience level to which the book is addressed. It was early in the trial stipulated by both sides that "the dialogue was written by the author to interpret what he thought the facts were" (R. 75), and that there is contained in this book certain dialogue from "quoted conversations heretofore published, but offered by this author to fit a given situation or the personality of the character he was portraying * * * and it was not done to alter the essential situation" (R. 75, 76).

The author testified that his "intention was to write an honest biography of a great baseball player and a pretty good fellow that young people would like to read, enjoy and

quite likely get some inspiration from, and undoubtedly the children would be getting an indication of Mr. Spahn's personality from this book" (R. 748-9).

The trial court, relying on prior New York cases stating that constitutional immunity "does not extend to a dramatized or fictionalized version of the event reported," concluded that the evidence adduced at trial warranted a finding against Appellants. (App. D, p. 11d). Referring to specifics, among what it called "all-pervasive" "offending characteristics", the trial court made foremost the book's mistaken statement that Spahn had won the Bronze Star; in fact, as the evidence adduced at trial showed, Spahn had won the Purple Heart, not the Bronze Star, but an article previously published in Sport Magazine had said he won the Bronze Star. The trial court went on at length to catalog a considerable number of like errors, "invented dialogue" and "attributed thoughts and feelings".

The court below, relying on the opinion of the trial court, found the work a "purported biography" because of the large number of "errors"; in the calculation of factual errors, the trial court had counted as such errors the use of invented dialogue (R. 721) (disregarding the parties' stipulation that the dialogue "was not done to alter the essential situation"), and a host of "errors" of detail. Appendix F lists specific errors concerning which Appellee himself testified at the trial, and compares each with the related statement in the book. Inspection will reveal the extent to which these "errors" altered the "essential situation."*

---

* It does not clearly appear from its decision that the court below examined for itself the record to determine the correctness of the conclusions of the trial and intermediate appellate court adopted by it. In *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254 (1921), this Court held, and in *New York Times Company* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686 (1964) reaffirmed, that when constitutional rights are involved the reviewing court must examine for itself the statements in issue and the circumstances under which they were made.

From the opinion of the Court of Appeals, it appears that its decision that constitutional protection did not extend to this book was predicated primarily on the use of the literary technique of invented dialogue and imaginary incidents, which it denominated as "fictionalized", thereby converting biography into "purported biography" and proscribed by Sections 50 and 51 not withstanding the author's reliance on reputable secondary sources.

How the Federal Question is Presented

A challenge under the First Amendment to Section 51 of the New York Civil Rights Law was urged on the trial court (R. 220; App. D, p. 1d, 6d, 7d), and in both appellate courts below. The Appellate Division (App. C) and the court below (App. B), in affirming, held that Section 51, as applied, did not violate the constitutional inhibitions.

The Question Is Substantial

The issues raised on this appeal are substantial and their resolution is of vital importance to publishers and authors of biography of living persons. The decision below denies to such publishers and authors the guarantees of the First Amendment: under a statute which, by its terms, would prohibit all unauthorized publication, for a profit motive, concerning a public figure, the New York courts have denied the right to publish any but a biography which can meet the challenge of whether it is "strictly factual". Proof of knowing or reckless falsity on the part of the publisher and of the author is not required as a condition to application of the statutory sanctions. A constitutionally inadequate, vague and subjective standard of "fictionalization" is used by the New York courts in determining, in limited deference to the First Amendment, whether a publication is or is not to be accorded constitutional protection. If "fictionalized," the court below holds, the publication serves no public interest, and, applying this

standard, has proscribed the publication of a biography employing, for the benefit of the juvenile audience to which it is directed, the literary technique of constructed dialogue, imaginary incidents, and attributed thoughts and feelings.[1]

A. The New York law does not now require proof and a finding of intentional or reckless falsification, for application of Section 51 of the Civil Rights Law to restrain publication of an unauthorized biography of a public figure.

The record in this case is devoid of proof of any intent on the part of the author, or, *a fortiori*, the publisher to fabricate.[2] Indeed Appellee acknowledged at the trial that the author was merely attempting to interpret what he thought the facts were, relying on secondary published sources; and the only testimony concerning intent was the author's, to which we have referred at pages 6-7, *supra*. Knowing falsity may not be imputed to the publisher from the fact that constructed dialogue and imaginary incidents were the literary form of the work; this Court rejected the argument, in *Time, Inc.* v. *Hill*, *supra*, that intentional fabrication or reckless disregard of truth is inherent in a finding of fictionalization. Yet under New York law, as expressed by the courts of that State, only "inadvertent or superficial inaccuracies" in a "strictly factual" presentation escape the fatal stigma of "fictionalization". Cf. the dissenting opinion in *Sutton* v. *Hearst Corp.*, 277 App. Div. 155, 157, 98 N. Y. Supp. 2d. 233, 235 (1950).

Bearing on the question of whether the record discloses knowing falsification or reckless disregard of the truth is

---

[1] In view of this Court's recent extensive review of the New York law in *Time, Inc.* v. *Hill*, U. S. , 17 L. Ed. 2d 456 (1967), our statement with respect to the substantiality of the question focuses only on the question presented by the application of New York law to restrain the publication of a biography of the person identified as its subject.

[2] Unlike the situation in *Time, Inc.* v. *Hill*, *supra*, in this case the author was an entirely independent entity, not an employee of the publisher.

the fact that both the trial court and the Appellate Division expressly denied exemplary damages, the latter court finding "there was no reason to doubt defendants' sincerity of belief that they were privileged in their activities on the ground that the published work was a purported biography and that a biography for juveniles required special treatment". (App. C, pp. 1c-2c; 23 App. Div. 2d 216, 217, 260 N. Y. Supp. 2d 451, 453).

The record discloses that the author relied on previously published matter as the source material for his work. The trial court, in admitting such published material in evidence, repeatedly cautioned that such publications were not accepted as proof of the truth of their contents, and ultimately found of "crucial significance" the author's testimony that he had created dialogue based upon a secondary source (App. D, p. 16d). While the trial court did not explain what it meant by "crucial significance", it is clear that its characterization of "fictionalization", errors and distortions was largely, if not entirely, based on this finding. Admittedly there were a very few incidents mentioned in the book for which the author had no secondary published source. But the record is utterly devoid of any evidence that *the publisher* knew of any infirmities in the research of the experienced author; or that the publisher was guilty of reckless conduct in its publishing or editorial procedure.

The decision below will necessarily significantly inhibit the publishing of biography because, under the doctrine of the court below, the publisher is always exposed not only to the costs of defense but to a determination by the trier of facts that the biography contains factual errors and distortions, or that the treatment is "fictionalized", albeit not defamatory nor violative of the public sense of decency. Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 487, 14 L. Ed. 2d 22, 28 (1965). The inhibition is substantial, notwithstanding the paucity of criminal prosecutions under Section 50,

which this Court noted in its opinion in *Time, Inc.* v. *Hill*, *supra*. Under the doctrine of the case below, the publisher has no immunity from its reliance in good faith on the work of an established experienced author, not even where the record shows that the author researched previously published materials for his sources.

The decision of the court below has already been relied on by a federal district court to sustain as sufficient a complaint that a strictly factual biography is "fictionalized" where the public and newsworthy subject alleges that his "personality" has been erroneously depicted. *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 261 F. Supp. 691, 696 (S. D. N.Y., 1966), in which the district court held that the claim, of a well known and newsworthy public figure, that a biography "is a fictitious version of his personality", sets forth a cause of action the merits of which must be resolved upon a trial.

We have referred to the inhibitory effect of the New York law on the publisher of a work written by an established author by reason of the peril that the work may later be held to be not purely "factual". A similar peril attends the author of a biography. New York law, as reflected in the decision below, does not permit the author of an "unauthorized" biography of a public figure to rely upon secondary sources; for all practical purposes, were this rule to stand, a public figure could preclude publication of any critical evaluation, or of a biography that fails to present his image as he wishes it presented. While acknowledging that the author relied on secondary sources, the trial court in this case held such reliance is not a defense in the absence of independent proof of the truth of the contents of such prior publications. We suggest that to impose such burden on an author and on a publisher violates the constitutional safeguards of the First Amendment, surely so in the absence of proof of intentional falsification. We suggest that where the biography of a public figure is based upon secondary sources and merely collates and presents such information which is already

known, the author, as well as the publisher, should be immune from attack as to the truth or falsity of statements contained therein, unless it can be shown that such falsity was deliberate or reckless.

Perhaps the New York courts presume intent to promote trade whenever they find fictionalization, for apart from the casual reference to intentional fictionalization in the Appellate Division's opinion in this case, the cases are clear that the publisher's intent is not an element of the cause of action. Indeed in *Thompson* v. *Close-Up, Inc.*, 277 App. Div. 848, 98 N. Y. Supp. 2d 300 (1950), the court held, on a motion for judgment on the pleadings, that even publication of a photograph by mistake may be found to have occurred "merely to increase . . . circulation"; hence actionable. In *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 48 Misc. 2d 760, 265 N. Y. Supp. 2d 754 (1965), malice was expressly rejected by the trial court as an element of a claim under Section 51 of the New York Civil Rights Law based on fictionalization (through dialogue, settings, and the appearance, expression and gestures of actors) of an actual occurrence of historical import.

The narrow evaluation by the New York courts of the scope of the First Amendment is revealed in the view, expressed in the opinion below (App. B, p. 4b; 18 N. Y. 2d 324, 329), that the constitutional protection announced by this Court in *New York Times Company* v. *Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686 (1964), is limited to cases involving libel actions brought by a "'public official'" against critics of his "official conduct"; the court below, stating that this case dealt with neither a public official nor official conduct, considered *Sullivan* and its standard of deliberate or reckless falsification inapplicable.

B. "Fictionalization" is too vague a standard for denial of constitutional protection.

The law of privacy in New York (articulated by the opinion of the Court of Appeals) imposes damages upon the author and publisher of a biography of a public figure.

which is not "factually" reported; while acknowledging that an accurate biography—even one containing a few minor errors—of a newsworthy person, for constitutional reasons, cannot be restrained under the privacy statute, New York law denies the constitutional protection under the First Amendment to a work it denominates as fictionalized because of its use of imaginary dialogue and improvised events as the literary techniques required to render the work suitable for the juvenile audience to which it is directed.

Under the terms of the New York statute, truth is irrelevant in an action for violation of the right of privacy. The trial court conducted the trial on this premise (R. 219-220). As Warren & Brandeis pointed out in *The Right to Privacy*, 4 Harv. L. Rev. 193, 218 (1890), the right of privacy has "no concern with the truth or falsehood of the matters published." Hofstadter & Horowitz refer to cases so holding in a number of states (*The Right of Privacy*, p. 256 (1964)).

Instead of neatly avoiding the conflict between the broad language of the statute and the First Amendment, as did the Utah Supreme Court in construing a similar statute in *Donahue v. Warner Bros. Pictures Dist. Corp.*, 2 Utah 2d 256, 272 P. 2d 177 (1954), the New York Courts have given a liberal construction to the statute and have extended its application far beyond the legislature's objective to overrule *Roberson v. The Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902). However, the New York Courts have excepted "factual" biography from the ban of the statute. *Koussevitsky v. Allen, Towne & Heath*, 188 Misc. 479, 68 N. Y. Supp. 2d 779, affd. 272 App. Div. 759, 69 N. Y. Supp. 2d 432 (1947). In so doing, they have drawn a line between the "strictly factual" and the "fictionalized" and have consistently denied protection under the First Amendment where they find "fictionalization" or "novelization". *Hill v. Hayes*, 15 N. Y. 2d 986, 207 N. E. 2d 604 (1965), was reaffirmed in the opinion below. In the express view of the

New York Court of Appeals, "fictionalization" is at the crux of the issue of whether a publication is entitled to constitutional protection. In some murky fashion, the New York court has found the "purpose of trade" to be present where a work is fictionalized or novelized, but not present where the work is factual or newsworthy. The standard of "purposes of trade" to justify restraint on publication was discounted by the dissenting judges in both Appellate Courts in *Hill* v. *Hayes*, and by this Court at least since *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501, 96 L. Ed. 1098, 1106 (1952).

"Fictionalized" or "novelized" are words which have been used to signify literary techniques, such as constructed dialogue which does not alter the essential truth, as here; dramatization "based, however, largely upon such information relating to an actual occurrence as could readily be obtained" (*Binns* v. *Vitagraph Co.*, 210 N. Y. 51, 56, 103 N. E. 1108 (1913); and, at the other extreme, the use of a person's name on a book completely unrelated to him (*Kriegef* v. *Popular Publications, Inc.*, 167 Misc. 5, 3 N. Y. Supp. 2d 480 (1938)).

The decision below fails to clarify the meaning of "fictionalization", although, for want of more explicit criteria, the court below used the distinction between "factual" and "purported" to explain its decision. Yet in its emphasis on "fictionalization" as the heart of the issue, the court below, adopting the finding of fictionalization of the trial court and the intermediate appellate court, was perpetuating the vague standard of "fictionalization" or "novelization" to justify the denial of constitutional protection.

The court below appears to equate "fictionalization", "dramatization", and "novelization", used as literary techniques, with fiction, drama and novels; but unlike a work of fiction, THE WARREN SPAHN STORY does not deal with a contrived plot or with fictitious characters. This book is not a work of fiction or a work only remotely connected with Appellee. It is a biography of Appellee. It deals with

his baseball career, his army career and previously publicized events of his life. It deals with actual people and actual events. Any "inaccuracies" and "untruths" in the form of "manufactured dialogue" and "contrived" incidents, resulted, with negligible exceptions, from the author's reliance on reputable secondary sources previously published.

In coming to its conclusion that a "fictionalized" biography does not merit the constitutional protection vis-a-vis the enforcement of the right of privacy, the court below made some attempt at balancing social interests. But in so doing, it ignored completely the testimony of expert witnesses concerning the need and use of biographies written for children, and that constructed dialogue is, and historically has been, a widely used technique in the writing of biography; and without any basis in the record, the court below determined that no public interest is served by protecting the publication of an unauthorized "fictionalized" biography. The Appellate Division, at least, had recognized a social need for such biography but considered it inferior to the commercial right of the subject to demand compensation for the right to use his name.

Of course, the right sustained by the court below, in this case, is not really the right of privacy at all; indeed the court stated that Appellee, so far as his professional career is concerned, is substantially without a right to privacy; however, it found, subsumed within the "right of privacy", a right in a public figure commercially to exploit his "personality", and it was this right which the court below balanced against the social and political values of the First Amendment to arrive at its determination. The right to be let alone, which is the essence of the right of privacy, is not at all involved in this case; there were no areas of Appellee's private life mentioned in the book which had not been the subject of prior publication with Appellee's consent or at Appellee's own instance. But without contending that even the most notorious publicity-

seeking figure does not have the right to be let alone in areas of his activities which are outside the scope of legitimate public interest, we do submit that to proscribe a biography for children, on the ground that its literary techniques "fictionalize" the subject, for the sake of promoting the latter's commercial interest in the financial exploitation of his "personality", does violence to the special position which the First Amendment occupies in our political structure.

This Court said in *Bridges* v. *California*, 314 U. S. 252, 263, 86 L. Ed. 192, 203 (1941), and Mr. Justice Black affirmed in his concurring opinion in *Time, Inc.* v. *Hill*, *supra*, in which Mr. Justice Douglas joined, that "• • • The First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press' ".

Is the publication of biographic literature for the millions of juvenile readers so low in the scale of social value that it does not merit the constitutional protection?

It is no longer open to dispute that such protection extends to the entertaining as well as the informative. *Winters* v. *New York*, 333 U. S. 507, 510, 92 L. Ed. 840, 847 (1947), where, indeed, this Court observed that the absence of discernible social value in a publication is not a ground upon which it may be denied protection equal to the protection afforded by the constitution to the best of literature.

Just as legislative preferences or beliefs could not transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression *(Bridges* v. *California, supra)*, the feeling "somewhat of an embarrassment" of Appellee ought not be permitted to do so. If balancing of interests is to be employed, the preponderance of weight must go on the side of the First Amendment. THE WARREN SPAHN STORY, is what, in form and in format, it purports to be, a biography which depicts the life story of Warren Spahn. Written as inspirational biography for

children, it serves the socially worthwhile function of fostering admiration of socially worthwhile conduct. The social value of the freedom to publish such work, we submit, far outweighs the commercial interest of the publicized individual in the right to sell his permission.

We submit that the standard "strictly factual", subject to the latitude of "a few minor errors", read into the statute by the court below, is so vague as to be constitutionally obnoxious. Apart from the fact that the constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and belief" published, *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445, 9 L. Ed. 2d 405, 425 (1963), this Court has held that the speech protected by the First Amendment cannot be restrained by a statutory standard that is vague, indefinite, or too broad in its language or scope. *Winters* v. *New York, supra; Smith* v. *California*, 361 U. S. 147, 4 L. Ed. 2d 205 (1959); *N. A. A. C. P.* v. *Button, supra;* Cf. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 86 L. Ed. 1031 (1942). While these cases involve standards under criminal statutes, what is civilly actionable under Section 51 of the New York law also constitutes a crime under Section 50.

Where would the restrictions on the right to publish under New York Law, as enunciated by the court below, stop?

Is the author of a biography permitted any emotional coloring to communicate more effectively the lesson he considers worth learning? Is biography as a literary form subject to suppression if the subject disagrees with the author's interpretation or evaluation of the subject's character or qualities or events in the subject's life? Is the trial forum to weigh the correctness of the author's good faith interpretation of events, or the subject's character? Is "truth" so objectively ascertainable that the publisher of a biography, which attempts to convey to the reader the author's interpretation of the character of the subject, may be exposed to the costs of defense and the risks of damages

and injunction under Section 51 of the New York Civil Rights Law? Are the author and publisher of an unauthorized biography required to establish the "truth" of the challenged interpretation of a public figure who has a different image of himself? Does the mere challenge by the subject of the "truth" of an unauthorized non-defamatory biography subject the publisher and author to the inhibitory burden of affirmative proof of the truth of previously published matter relied on by the author?

Is a literary form utilizing constructed dialogue, consistent with the known truth, inherently fiction and so tainted by the "purposes of trade," as to be subject to suppression? Should speech which cannot be enjoined even when defamatory, nevertheless be subject to injunction for violation of privacy if it is merely "fictionalized" in the sense of not being entirely accurate, although generally consistent with the known truth? Should the First Amendment standard applied to an attempted restraint of a non-defamatory publication on the ground that it violates someone's commercial right to exploit his personality be less rigorous than the standard applicable to defamatory statement? Does a public figure, who has avidly sought publicity, retain the right to suppress an unauthorized non-defamatory "fictionalized" biography, or has he by his conduct willingly exposed himself to such writing?

If, as in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 271, 11 L. Ed. 2d 686, 701 (1964), "The constitutional protection does not turn upon the truth, popularity or social utility of the ideas and belief which are offered, * * *" New York law violates the constitutional inhibition in denying protection to a "fictionalized" biography of a public figure, absent at least a clear showing of deliberate falsification. Warren & Brandeis, as long ago as 1890, recognized this point in *The Right to Privacy*, in pointing out that if a false defamatory statement is privileged, it should be no less, privileged under the law of privacy. 4 Harv. L. Rev. 193, 216.

Conclusion

We suggest that only where the biography, taken as a whole, has no connection with or only a tenuous connection with the subject (the view reached by the Utah Supreme Court in 1954 in *Donahue* v. *Warner Bros. Pictures Dist. Corp., supra*), or is utterly devoid of social value (*Cf. Roth* v. *U. S.*, 354 U. S. 476, 1 L. Ed. 2d 1498 (1957)), or where there is proof of actual malice on the part of the publisher, or of deliberate falsification, or flagrant and reckless disregard for the truth, may the constitutional guarantee be unavailable. None of those elements is present in the case at bar.

It is respectfully submitted that the question is substantial and should be accorded plenary consideration and decided by this Court.

Respectfully submitted,

Selig J. Levitan
630 Fifth Avenue
New York, N. Y. 10020
Attorney for Appellants.

Joel T. Camche,
Ellis B. Levine,
Of Counsel.

APPENDIX A

No. 158 **Judgment Appealed From**

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of October in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS, THE HON. CHARLES S. DESMOND, Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR October 27, 1966.

1. No. 158. 66

WARREN E. SPAHN,
Respondent,

vs.

JULIAN MESSNER, INC., & ANO.,
Appellants.

BE IT REMEMBERED, That on the 6th day of April in the year of our Lord one thousand nine hundred and sixty-six, Julian Messner, Inc., & ano., the appellants in this cause, came here unto the Court of Appeals, by Selig J. Levitan, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Warren E. Spahn, the respondent in said cause, afterwards appeared in said Court of Appeals by Earle Warren Zaidins, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Selig J. Levitan, of counsel for the appellants, and by Mr. Earle Warren Zaidins, of counsel for the respondent, briefs filed by *amici curiae*, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, October 27, 1966.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal]

Raymond J. Cannon,
Clerk.



APPENDIX B

Opinion of New York Court of Appeals

Spahn v. Julian Messner, Inc.

(Decided October 27, 1966)

Opinion per KEATING, J.

KEATING, J. To the knowing and the novice alike, the name Warren Spahn brings to mind one of professional baseball's great left-handed pitchers.

Each year, millions of people attend various ball parks throughout the country, hoping to root their team on to victory. National network systems transmit the games into homes and offices and huge sums are expended by advertisers for the attention of audiences attracted to the sport. Each Fall at World Series time, commerce and political programs equally are brought close to a standstill while a large part of the national attention is otherwise diverted.

The size of the audience attracted to each game, whether in person or by transmission, is the profession's bread and butter. The individual player's income will frequently be a direct reflection of his popularity and ability to attract an audience. Professional privacy is thus the very antithesis of the player's need and goal.

With this background, the plaintiff, Warren Spahn, seeks an injunction and damages for the defendants' unauthorized publication of a fictitious biography of his life.

The action is predicated on section 51 of the Civil Rights Law, which authorizes the double remedy where a person's "name, portrait or picture is used within this state for advertising or for the purposes of trade" without that person's written consent. Its enactment may be traced directly to this court's opinion in *Roberson v. Rochester Folding Box Co.* (171 N. Y. 538, 545), wherein we denied the existence of a legal right to privacy in New York but said

that "The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name or another for advertising purposes without his consent." In *Rhodes* v. *Sperry & Hutchinson Co.* (193 N. Y. 223, affd. *sub nom. Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502) the statute enacted as a result of *Roberson* was held constitutional against claims that it deprived persons of liberty and property without due process of law and that it impaired the obligations of contract.

Over the years since the statute's enactment in 1903, its social desirability and remedial nature have led to its being given a liberal construction consonant with its over-all purpose (*Flores* v. *Mosler Safe Co.*, 7 N Y 2d 276, 280-281; *Lahiri* v. *Daily Mirror*, 162 Misc. 776, 779). But at the same time, ever mindful that the written word or picture is involved, courts have engrafted exceptions and restrictions onto the statute to avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest.

One of the clearest exceptions to the statutory prohibition is the rule that a public figure, whether he be such by choice or involuntarily, is subject to the often searching beam of publicity and that, in balance with the legitimate public interest, the law affords his privacy little protection (*Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, affd. 272 App. Div. 759; *Goelet* v. *Confidential, Inc.*, 5 A D 2d 226; see Hofstadter and Horowitz, The Right of Privacy, § 6.5 *et seq.*).

But it is erroneous to confuse privacy with "personality" or to assume that privacy, though lost for a certain time or in a certain context, goes forever unprotected (*Binns v. Vitagraph Co.*, 210 N. Y. 51; *Hill* v. *Hayes*, 15 N Y 2d 986, affg. 18 A D 2d 485). Thus it may be appropriate to say that the plaintiff here, Warren Spahn, is a public personality and that, insofar as his professianl career is involved, he is substantially without a right to privacy. That

is not to say, however, that his "personality" may be fictionalized and that, as fictionalized, it may be exploited for the defendants' commercial benefit through the medium of an unauthorized biography.

The factual reporting of newsworthy persons and events is in the public interest and is protected. The fictitious is not. This is the heart of the cases in point (*Hill* v. *Hayes*, 15 N Y 2d 986, *supra*; *Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, affd. 272 App. Div. 759, *supra*; *Goelet* v. *Confidential, Inc.*, 5 A D 2d 226; *supra*; *Youssoupoff* v. *Columbia Broadcasting System*, 19 A D 2d 865).

The plaintiff's status as a public figure makes him newsworthy and thus places his biography outside the protection afforded by the statute. But the plaintiff does not seek an injunction and damages for the unauthorized publication of his biography. He seeks only to restrain the publication of that which *purports to be his biography*.

In the present case, the findings of fact go far beyond the establishment of minor errors in an otherwise accurate biography (see *Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 484, *supra*). They establish "dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events" (opinion of the Appellate Division, 23 A D 2d 216, 221). In the language of Justice Markowitz, who presided at the trial, "the record unequivocally establishes that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual errors, distortions and fanciful passages" (43 Misc 2d 219, 232). A sufficient number of specific instances of falsification are set forth in that opinion to make repetition here unnecessary.

It is urged upon us that application of the statute to the publication of a substantially fictitious biography will run afoul of the freedoms of speech and the press guaranteed by the First and Fourteenth Amendments to the Federal Constitution. The point is urged on the basis of the Su-

preme Court's opinion in *New York Times Co.* v. *Sullivan* (376 U. S. 254). We think it has no application.

The question posed in *New York Times Co.* v. *Sullivan* (*supra*) was stated by Mr. Justice BRENNAN as "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a *public official* against critics of his *official conduct*" (p. 256, emphasis added). Moreover, Justice BRENNAN said (p. 270), "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The court thus held that "the Constitution delimits a State's power to award damages for libel in actions brought by *public officials* against critics of their official conduct" (p. 283; emphasis added).

The present case deals neither with public officials nor official conduct. The free speech which is encouraged and essential to the operation of a healthy government is something quite different from an individual's attempt to enjoin the publication of a fictitious biography of him. No public interest is served by protecting the dissemination of the latter. We perceive no constitutional infirmities in this respect.

We thus conclude that the defendants' publication of a fictitious biography of the plaintiff constitutes an unauthorized exploitation of his personality for purposes of trade and that it is proscribed by section 51 of the Civil Rights Law.

The order appealed from should be affirmed.

Chief Judge DESMOND and Judges FULD, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

Order affirmed.





APPENDIX C

Opinion of Appellate Division

BREITEL, J. P.:

Plaintiff, a well-known baseball pitcher, obtained compensatory damages of $10,000 and an injunction, after trial without a jury, for invasion of his right of privacy under sections 50 and 51 of the Civil Rights Law. The invasion consisted of an unauthorized fictionalized biography of plaintiff published for a juvenile readership. Defendants publisher and author appeal. They argue that the publication was privileged and one not for "advertising purposes or the purposes of trade" and therefore without the statute. Plaintiff cross-appeals on the ground of the inadequacy of the compensatory damages and from the denial of exemplary damages and interest on the damage award.

The only significant issue is whether the publication was privileged or exempt.* On the damage issues there is insufficient reason to disturb the conclusions of the trial court. Compensation was properly limited to modest proportions because the offending book was a laudatory one and plaintiff had long permitted widespread exploitation of his baseball feats and fame. Exemplary damages were properly denied, at least in the exercise of discretion, because there was no reason to doubt defendants' sincerity of belief that they were privileged in their activities on

---

* In truth, the only question is one of exemption. There are uses exempted because on no view do they involve "advertising" or "trade"; there are still others that are literally advertising or trade but for strong policy reasons have been exempted by statutory construction from the application of the statute. The latter are most often referred to as privileges. The cases, however, are not uniform in their terminology (cf. *Booth* v. *Curtis Publishing Co.*, 15 A D 2d 343, *infra*, affd. 11 N Y 2d 907; *Gautier* v. *Pro-Football*, 304 N. Y. 354, 359, *infra*; *Humiston* v. *Universal Film Manufacturing Co.*, 189 App. Div. 467, 472-473, *infra*).

the ground that the published work was a purported biography and that a biography for juveniles required special treatment. Nor is plaintiff entitled to interest on the award since it does not compensate for an external economic interest (see *De Long Corp.* v. *Morrison-Knudsen Co.*, 20 A D 2d 104, affd. 14 N Y 2d 346; Restatement, Torts, § 913). Because it is concluded that the publication was not privileged or exempt, the award for compensatory damages should be affirmed, and therefore the entire judgment should be affirmed as should the order denying the motion for exemplary damages and interest on the award.

Section 50 of the Civil Rights Law reads:

> "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor."

Section 51 of the Civil Rights Law, in pertinent part, reads as follows:

> "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages."

The statute, corrective of the common law in this State, has had a long history and has been the subject of extensive judicial elaboration (*Flores* v. *Mosler Safe Co.*, 7 N Y 2d 276, 280-283, incl. dis. op. by Van Voorhis, J. at pp. 285-287. See also, Restatement, Torts, § 867, incl. Comments;

Prosser on Torts [3rd Ed.] pp. 829-851, *passim;* Hofstadter and Horowitz, *The Right of Privacy* [1964], *passim*). Although the statute makes no express provision therefor, the courts have engrafted upon it certain privileged uses or exemptions. Generally, the privileged uses are concerned with leaving untrammeled matters of news, history, biography, and other factual subjects of public interest despite the necessary references to the names, portraits, identities, or histories of living persons (e.g., *Gautier* v. *Pro-Football,* 304 N. Y. 354, 359-360; *Booth* v. *Curtis Publishing Co.,* 15 A D 2d 343, affd. 11 N Y 2d 907; *Dallesandro* v. *Holt & Co.,* 4 A D 2d 470; *Oma* v. *Hillman Periodicals,* 281 App. Div. 240; *Wallach* v. *Bacharach,* 192 Misc. 979, affd. 274 App. Div. 919; *Koussevitzky* v. *Allen, Towne & Heath,* 188 Misc. 479, 485 [Shientag, J.], affd. 272 App. Div. 759; *Humiston* v. *Universal Film Mfg. Co.,* 189 App. Div. 467; Prosser, *op. cit. supra,* pp. 844-850).

Plaintiff is concededly a public figure in the sports world and therefore it is not disputed that he and his personal history are subject to public exposure in the news, literature, and public commentaries, whether or not such exposure is for profit. The question in this case arises because the book concerning plaintiff, although a purported biography, has been fictionalized, concededly, in order to make it suitable for a juvenile readership. Plaintiff therefore argues that the publication is not privileged and is not exempted from the statute. Defendants stress that a biography for a juvenile readership must be fictionalized and dramatized if it is in fact to be read widely.

Thus it is conceded that use was made of imaginary incidents, manufactured dialogue and a manipulated chronology. In short, defendants made no effort and had no intention to follow the facts concerning plaintiff's life, except in broad outline and to the extent that the facts readily supplied a dramatic portrayal attractive to the juvenile reader. This liberty, for example, was exercised with respect to plaintiff's childhood, his relationship with his

father, the courtship of his wife, important events during their marriage, and his military experience.

In *Koussevitzky* v. *Allen, Towne & Heath, supra*, a leading case, it was held that the statute was not applicable to a biography. It was also held that the infiltration if inaccuracies did not defeat the privilege, and that for defamatory inaccuracies plaintiff would be left to his remedy under the general law of defamation. Mr. Justice Shientag, in his discussion, emphasized the necessity to avoid hampering freedom of speech and of the press. He also pointed out that "all publications" are produced presumably for profit and with a view to increasing circulation, and that such a profit motive did not destroy the privilege. At the same time, however, he pointed out:

> "The right of privacy statute does not apply to an unauthorized biography of a public figure unless the biography is fictional or novelized in character" (at p. 484).

The distinction between an intentionally fictionalized treatment and a straight factual treatment (subject to inadvertent or superficial inaccuracies) was the basis for this Court's holding in *Youssoupoff* v. *Columbia Broadcasting System* (19 A D 2d 865). This appears both from the memorandum of the majority and the concurring opinion of Mr. Justice Steuer, joined in by Mr. Justice Eager. The distinction was again one of the bases for this Court's holding in *Hill* v. *Hayes* (18 A D 2d 485, affd. on the maj. and conc. ops. below, — N Y 2d —), in which Mr. Justice Stevens stressed the fictionalization and dramatization of an actual event as a factor contributing to the negation of any privilege or exemption from the statute. Mr. Justice Rabin, in a concurring opinion, said of the offending publication:

> "The difficulty with the position of the defendant *Time* is that it portrayed the previous Hill incident in a highly sensational manner and represented that the play was a true version of that event. It was not.

It was fictionalized and the jury so found. Consequently it violated section 51 of the Civil Rights Law . . ." (at p. 491).

The distinction is not an entirely new one. In this State, even before the *Koussevitsky* case, *supra*, it was beginning to take form in *Binns* v. *Vitagraph Co.* (210 N. Y. 51).*

In the *Binns* case a dramatized reenactment in motion picture form of an heroic experience in which plaintiff had been the participant was held to create liability in connection with the advertising and distribution of the completed picture. The court distinguished the situation from one in which a living person was photographed in an actual event, without added contrived portrayals not essential to presentation of the actual event (at pp. 57-58).

The distinction or rule is a sound one and it dictates affirmance of the judgment in favor of plaintiff. Notably, the statute makes no provision for any privileged uses or exemptions. Whatever privileges or exemptions have been developed in the decisional law rest on strong policy considerations and, perhaps to some extent, on constitutional guarantees of free speech and of the press. Privileges or exemptions should not be facilely extended judicially except out of the necessities of the strongest public policy or by reason of constitutional mandates. Any extension beyond is in the province of the Legislature.

It may well be, as defendants urged and, perhaps, proved, that juvenile biography requires the fillip of dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events. If so, the publication of juvenile biographies of living persons, even if public figures, may only be effected with the written consent of such persons. And if it also be true, as defendants suggest, that such

---

* For a valuable discussion of the effect of falsity in negating the privilege of publication concerning public figures and a collection of cases not limited to this State, see Prosser, *op. cit. supra*, pp. 837-839.

persons use the consent as a lever for obtaining a price for it, then it is no more than charging a price for taking liberties, otherwise unwarranted, with one's personal history. The consent and the price can be avoided by writing strictly factual biographies or by confining unauthorized biographies to those of deceased historic persons.

Actually, there is not only a matter of price involved. It is true, as it ought to be, that a public figure is subject to being exposed in a factual biography, even one which contains inadvertent or superficial inaccuracies. But surely, he should not be exposed, without his control, to biographies not limited substantially to the truth.

The fact that the fictionalized treatment is laudatory is immaterial, except perhaps as it may influence the assessment of damages, for three reasons. In the first place, a laudatory treatment may make one appear more ridiculous than a factual one, at least to those who know enough of the truth. In the second place, one may have strong feelings about not being portrayed in any exaggerated light. Lastly, there may be serious difficulties in determining what is laudatory. So long as it is not the truth, the subject of the distorted biography ought to have the right to permit or prevent its being published.

In short, the statute prohibits invasions of privacy for purposes of advertising or trade. Book publication is a trade like any other, except that its intellectual value to society is uniquely great and vital to civilization. To the extent that freedom of the press in the ultimate interest of the public's right to factual knowledge protects the publication of the factual and historical, the publication is exempt from the proscriptions of the statute. Moreover, this exemption extends to the advertising and other secondary uses of the primary news or cultural or historical publications (see, generally, *Booth v. Curtis Publishing Co., supra*). If the publication, however, by intention, purport, or format, is neither factual nor historical, the statute applies,

and if the subject is a living person his written consent must be obtained.

To be sure, there m y be difficulties in many cases in separating the fictionalized work from the factual work, especially if the factual work has been liberally reconstructed from available evidence, but in this case there is no such difficulty. Instead, there was unabashed fictionalization, using some factual background and the identity of plaintiff only because otherwise there would be no interest in the purchase of the book.

In the ultimate result, the publisher of the distorted biography is in no inescapable quandary. All he need do is obtain the written consent of the living person whose personal life he wishes to distort and exploit. Nor will the children who read suffer unduly if the biographies purveyed for their reading are restricted to the duller factual ones or only to the livelier ones for which the subjects, if living, have given their written consents. In any event, the deprivation to the writer, the publisher, and the children is small as compared with subjecting the public figure to the uncontrolled distortion of his personality and history, short only of defamation or an actually intentional injury to his reputation.

Accordingly, the judgment and order should be affirmed, with costs and disbursements on the judgment appeal to plaintiff against defendants and with costs and disbursements on the order appeal to defendants against plaintiff.

ALL CONCUR.

APPENDIX D

Opinion of the Trial Court

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART VIII

[SAME TITLE]

MARKOWITZ, JACOB, J.:

Plaintiff Warren Spahn, a baseball pitcher of wide renown and acclaim, seeks an injunction against the unauthorized publication of a book purporting to be his biography, THE WARREN SPAHN STORY written by Milton J. Shapiro and published by Julian Messner, Inc., and damages for injuries sustained by reason of said publication and distribution.

Spahn alleges that the defendants are "taking pecuniary advantage of plaintiff's name, photographs, and likeness and private life to create for profit a fictionalized and dramatic story, fanciful, and sensational in nature, designed primarily and exclusively for entertainment value, and to thrill, adventurize, amuse and inspire (defendants') reading public." The present law suit is thus predicated upon the contention that the fictionalization of his life story, the inclusion in the book of aspects of his private life and the concomitant commercial exploitation of his name and likeness constitute an infringement of plaintiff's "Right of Privacy".

Defendants urge that THE WARREN SPAHN STORY is not, and cannot, consistent with Article I, section 8 of the Constitution of the State of New York and the First Amend-

ment to the Constitution of the United States, be deemed to be, within the proscriptions of Article 5 (sections 50 and 51) of the Civil Rights Law.[1]

While the essence of the right of privacy excludes precise verbal definition, it comprehends, in its pure form, the individual's absolute dominion and control over his "inviolate personality"—the individual's property right in his very being, whether manifested by his actions, his thoughts, his character, his appearance, his name. Dean

---

[1] § 50. RIGHT OF PRIVACY

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without first having obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 51. ACTION FOR INJUNCTION AND FOR DAMAGES

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

Prosser, a leading authority in the law of torts, defines the law of privacy as "comprising four distinct kinds of invasion of four different interests * * * 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2. Public disclosure of embarrassing private facts about the plaintiff; 3. Publicity which places the plaintiff in a false light in the public eye; 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." (Prosser, *"Privacy"*, 48 Cal. L. Rev. 383, 389).

New York Law recognizes Article 5 of the Civil Rights Law as the fountainhead of the right to legal redress for the invasion, appropriation and commercial exploitation of the individual's personality (*Gautier* v. *Pro-Football, Inc.*, 304 N. Y. 354, 358; *Hill* v. *Hayes*, 18 A. D. 2d 485, 488).

The New York statutory "Right of Privacy" represents the Legislature's unequivocal response to the judicial pronouncement in the case of *Roberson* v. *Rochester Folding Box Co.* (171 N. Y. 538, 547) that "the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions." An overwhelming majority of American jurisdictions has rejected the *Roberson* v. *Rochester Folding Box Co., supra,* decision and reasoning and has recognized the right of privacy as a natural law, non-statutory right. The judicial landmark of this corpus of the law is the justly venerated *Pavesich* v. *New England Life Ins. Co.* (50 S. E. 68). In that case, the court first enunciated the doctrine that the right of privacy was both a right "derived from natural law" and one "guaranteed to persons * * * by the Constitution of the United States." (id. at 71) "If personal liberty embraces the right of publicity," the court (at 70) declared with reference to the First Amendment Freedom of expression, "it no less embraces the correlative right of privacy."

If in their views on the origin of the right of privacy, the New York statutory and the natural-right views represent differing protagonists, the case-law evolved by each jurisdiction closely parallels that of the other. The reason

is clear. Article 5 of the Civil Rights Law couches the right of privacy and concomitant proscription in the language of all encompassing imperative. Accordingly, the New York courts, mindful of the tenor of the times and the attendant needs of the individual, have moulded the corpus of the right of privacy doctrine. In so doing, the judiciary early adopted the guiding principle that "(a) statute of this kind is not 'to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words'. It is 'not an alien intruder in the house of the common law, but a guest to be welcomed * * * as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social needs.'" (*Lahiri* v. *Daily Mirror, Inc.*, 162 Misc. 776, 779, quoted with favor in *Flores* v. *Mosler Safe Co.*, 7 N Y 2d 276, 281).

During its early formative years, the right of privacy was shaped to meet the protection needed against the excesses of "yellow journalism" and the unauthorized practices of advertising, then in their embryonic stages. Today, the right must be construed in the context of a society that cannot cavalierly dismiss the pragmatic realities of our day. Scientific advances have multiplied the potential for infringement of the individual's sanctity, and the demands of our highly complex industrialized society dangerously engulf and threaten the perimeter of man's ever-shrinking sphere of personal liberty.

These constant and increasing pressures upon the individual's right to inviolate personality and dignity have awakened in us an acute awareness that even as against the State, the right of privacy represents but another facet of the fundamental rights to life, liberty and the pursuit of happiness—that the inalienable right of life must comprehend more than the antithesis of biological death; the right of liberty, more than the absence of physical restraint. If, in 1928, it required the prophetic perception of Mr. Justice Brandeis to discern that "the makers of our Constitution * * * conferred, as against the Govern-

ment, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 478), the temper of our times has aroused a now receptive and understanding judiciary and public. Great rights, if not created, are perceived by man when he is threatened with their loss.

Present day judicial cognizance that the essence of the Fourth Amendment is the individual's right of privacy has spawned an incipient awareness that a general right to privacy is part of the "life" and "liberty" protected by the Due-Process Clauses of the Fifth and Fourteenth Amendments.

"This notion of privacy", Mr. Justice DOUGLAS has recently declared, "is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live." (*Poe* v. *Ullman*, 367 U. S. 497, 521.) Indeed, within the very recent memory of man, recognition of the right of privacy has emerged as a distinguishing hallmark of our society.

The concept of a right of privacy as a constitutional right safeguarding the individual against unreasonable governmental action must be distinguished from the individual's private law right of privacy against infringement by another individual. Nevertheless, it cannot be doubted that the stature and scope of the private law right have been greatly enhanced by the recent development of its constitutional law counterpart. Thus, to construe the statutory right of privacy in a decimating fashion and without consideration of the present-day background and the newly-expanded constitutional right of privacy would relegate the law of New York to a petrified and outmoded position in a dynamic society.

This does not mean that the right of privacy is absolute. "A legal system attains its end by recognizing certain interests,—individual, public and social—by defining the limits within which these interests shall be recognized

legally * * * and by endeavoring to secure the interests so recognized within the defined limits" (Pound, "interests of Personality", 28 Harv. L. Rev. 343). The case by case delineation of the sphere of the individual's right of privacy has been the handiwork of the judicial process.

In drawing this fine line of demarcation, the courts have been singularly aware that society's interest in the preservation of the inviolate personality conflicts with the public interest in the free and unimpeded dissemination of news and of information (paraphrasing *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 436, affd. 304 N. Y. 354). Defendants maintain (especially in the light of the recent pronouncement of the United States Supreme Court in *New York Times Co.* v. *Sullivan* (376 U. S. 254)), that Freedom of the Press is absolute and unconditional and that sections 50 and 51 of the Civil Rights Law, if applied to the author and publisher of a biography, are "unconstitutional since they would violate the rights of Freedom of the Press under Article 1, section 8 of the Constitution of the State of New York and the First Amendment to the Constitution of the United States."

Any contention that the matter now before this Court falls within the purview of the Supreme Court interdiction in the *New York Times Company* v. *Sullivan, supra,* case, must be dismissed. The Supreme Court in that case explicitly limited its decision. "'We hold today", the Court said at 283, "that the Constitution delimits a State's power to award damages for libel in actions brought by *public officials* against critics of their *official conduct.*" (emphasis supplied.)

Of paramount importance, neither in *New York Times* v. *Sullivan, supra,* nor in any other case, has the high Court adopted the absolutist view of the rights safeguarded by the First Amendment (see *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436). To so classify Freedom of the Press as an unconditionally absolute right would inexorably relegate other rights to a deferred position. "(W)e can establish

no firsts without thereby establishing seconds" (Mr. Justice JACKSON dissenting in *Brinegar* v. *United States*, 338 U. S. 160, 180). The Founding Fathers well knew the value of Freedom of the Press as an indispensable safeguard for the security of our form of government. They were equally profoundly committed to the principle that the ultimate purpose of our government is to secure man's "unalienable Rights" among which are "Life, Liberty and the pursuit of Happiness". Neither may be completely and automatically subordinated to the other. (See Schwartz, *The Supreme Court*, 232-237 (1957). Judicial protection of each of the fundamental tenets upon which our system of government is founded "is necessarily qualified by the requirements of the Constitution as an entirety for the maintenance of a free society" (Mr. Justice FRANKFURTER, concurring in *Pennekamp* v. *Florida*, 328 U. S. 331, 352).

In a leading right of privacy case (*Barber* v. *Time, Inc.*, 159 S. W. 2d 291) in which defendant Time magazine raised the same Constitutional arguments propounded by the defendants in this case, Commissioner HYDE (later Chief Justice) aptly stated, at page 295:

> "* * * freedom of the press was not created merely for the benefit of the press, but because it is essential to the preservation of free government and progress of civilization.* * * Therefore, the press, like individual citizens, must not abuse its constitutional rights or overlook its obligations to others.
>
> "Thus, establishing conditions of liability for invasion of the right of privacy is a matter of harmonizing individual rights with community and social interests.* * *. (T)hey can be harmonized on a reasonable basis, recognizing the right of privacy without abridging freedom of the press."

It is in this context that the courts must, and have weighed and balanced, the competing interests in each right of privacy controversy.

Earlier courts in striving to achieve a point of equilibrium between the two antagonistic interests have bequeathed to us a heritage of judicial experience and guidance. From the beginning, the courts have consistently declared that items of current news and news reports concerning those who are the subject of news, whether public figures or otherwise, are exempt from the prohibitions of the "Right of Privacy" statute. In like manner, the statute "has been held not to apply to articles which, though not strictly news, are informative and educational and which make use of the names or pictures of living persons" (*Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 482, affd. 272 App. Div. 759). These broad exceptions to the protective aegis of the "Right of Privacy" statute are predicated upon the society's supreme commitment to the public's "Right to Know", and the decisions reveal an extremely liberal interpretation of the scope of the public's legitimate interest in the dissemination of current events and informative and educational matter.

Judicial refinement of the individual's legal sanctuary, however, has not stripped him of the protective mantle of the law. Rather has it tailored his cloak to fit the individual's dual role as an individual and as a member of our society. If the affairs of an individual fall within the purview of current news or information in which the community has a legitimate interest, the private individual's status as a member of society attains dominance, and he is metamorphosed into a public figure who must yield his right of privacy to the interest of the public.

The juridical concept of the public figure vis-a-vis, the right of privacy has not been definitively enunciated despite a plethora of *ad hoc* responses to justiciable problems involving persons of renown. Initially, it must be emphasized that neither the natural law doctrine nor the New York statute discriminates between a private and a public personage.

The right of privacy—the right in the "inviolate personality"—inheres in each individual. Of particular significance to a public figure is that facet of the right of privacy which, as the obverse of the right of withdrawal from the glare of public scrutiny, embraces the "right of publicity", the exclusive property interest in one's name, portraiture and picture (*Haelan Laboratories* v. *Topps Chewing Gum*, 202 F. 2d 866, 868, cert. den. 346 U. S. 816). The Law has long recognized that "(a) man's name is his own property, and he has the same right to its use and enjoyment as he has to that of any other species of property" (*Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 544).

Indeed, the very purpose of sections 50 and 51 is the prevention of "the use of an individual's name (portraiture or picture) for commercial purposes without his consent" (*Orsini* v. *Eastern Wine Corp.*, 190 Misc. 235, 236). "(T)he right protected is the right to be protected against the commercial exploitation of one's personality" (*Hill* v. *Hayes*, 18 A D 2d 485, 488; *Gautier* v. *Pro-Football, Inc.*, 304 N. Y. 354, 358).

The unauthorized use of another's name and picture can no more be countenanced by the Law than can the illegal appropriation for profit of any other form of another's property. A prominent figure's "right of publicity" (*Haelan Laboratories* v. *Topps Chewing Gum*, *supra*), the exclusive interest in the financial worth of one's personality, constitutes a legally protected property interest. "(W)here a cause of action under the civil rights statute has been established, damages may include recovery for a so-called 'property' interest inherent and inextricably interwoven in the individual's personality." (Shientag, J., in *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 438, see *Manger* v. *Kree Institute of Electrolysis*, 233 F. 2d 5, 9; *Redmond* v. *Columbia Pictures Corp.*, 277 N. Y. 707).

The public figure's right of privacy is, however, far from absolute.

"Anyone becoming involved in matters of news interest must submit to the resulting publicity. Those seeking notoriety will be said to have waived, and those having it thrust upon them to have lost, their right to personal seclusion" (Hofstadter, *The Development of the Right of Privacy in New York,* 39 (1954) and to the exclusive property interest in the other facets of personality.

Such waiver or loss is neither absolute nor unconditional, but only *pro tanto,* i.e., only "to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made" (Warren and Brandeis, *"The Right to Privacy",* 4 Harv. L. Rev. 193, 215 (1890); see *Pavesich* v. *New England Life Ins. Co.,* 50 S. E. 68, 80, in which the Court said, "* * * even the President of the United States in the lofty position which he occupies, has some rights in reference to matters of this kind, which he does not forfeit by aspiring to or accepting the higest office within the gift of the people of the several states."

Manifestly, precise delineation of the line of demarcation between the private and the public areas of a public figure's life and the concomitant finding of statutory protection or waiver must be determined upon each factual pattern.

Even as to those aspects of one's life deemed to be within the legitimate interest of the public, the use of an individual's name, portrait or picture is legally restricted. Since the rationale of waiver or loss of the protection afforded by the right of privacy postulates the public's right to know, the privilege of using another's name, portrait or picture without permission exists only within the strict confines of the vindication of this public interest. An individual's *pro tanto* waiver of his exclusive property interest and right in his personality is precisely commensurate with the extent of the legitimate interest of society.

Thus, "(w)hile one who is a public figure or is presently newsworthy may be the proper subject of news or informative presentation, the privilege does not extend to commercialization of his personality through a form of treatment distinct from the dissemination of news or information" (*Gautier* v. *Pro-Football, Inc.*, 304 N. Y. 354, 359; see to the same effect *Binns* v. *Vitagraph Co. of America*, 210 N. Y. 51; *Sutton* v. *Hearst Corp.*, 277 App. Div. 155; *Hill* v. *Hayes*, 18 A D 2d 485, 491). Society's "immunity granted in respect to informative matter does not extend to a dramatized or fictionalized versions of the event reported" (STEUER, J., concurring in *Youssoupoff* v. *Columbia Broadcasting System, Inc.*, 19 A D 2d 865-866), nor may an author claim exemption from the proscriptions of the "Right of Privacy" statute if the "biography is fictional or novelized in character." (*Koussevitzky* v. *Allen, Towne & Heath, supra*, at 484.)

Application of the aforestated juridical criteria to the testimony and evidence adduced at the trial establishes beyond cavil that publication of the book, THE WARREN SPAHN STORY, constitutes a violation of the prohibitions of section 51 of the Civil Rights Law. The breadth and depth of the offending characteristics of the book are so all-pervasive as to render impracticable their complete recitation without inordinately extending the length of this opinion. Accordingly, the court has limited itself to reference to but relatively few examples of the violating contents. The critical significance of even this small portion of the record emerges clearly when viewed within the perspective of the general nature of the book itself, for the whole tenor of THE WARREN SPAHN STORY is gauged to project a supposed close association with the hero and the format can best be characterized as a series of vividly picturesque and detailed incidents profusely highlighted with dialogue.

Two chapters of the book are devoted to Spahn's experiences in World War II. The book mistakenly states that

Warren Spahn had been decorated with the Bronze Star. In truth, Spahn had not been the recipient of this award, customarily bestowed for outstanding valor in war. Yet the whole tenor of the description of Spahn's war experiences reflects this basic error. Plaintiff thus clearly established that the heroics attributed to him constituted a gross non-factual and embarrassing distortion as did the description of the circumstances surrounding his being wounded. Sergeant Spahn was not in charge of "supervision of the repairs" (p. 10) of the Bridge at Remagen; Spahn did not go "from man to man, urging them on" (p. 9); Sergeant Spahn did not go "into the town of Remagen to check with his company commander on his orders for the day" (p. 11) and, consequently, the whole description thereof is imaginary; Spahn had not "raced out into the teeth of the enemy barrage" (p. 13); and in addition to other untruthful statements surrounding his being wounded, Spahn was not "rolled * * * onto a stretcher" (p. 14); but remained ambulatory at all times after treatment in the First Aid Station.

In addition, Spahn successfully contested the accuracy of many salient factors regarding his experiences at Camp Gruber.

In like manner, the theme of those chapters which pertain to Spahn's boyhood and teen-age life inaccurately portrays the dominant role of Spahn's father in the selection of and training for a baseball career for plaintiff and the near symbiotic relationship between the two. Plaintiff successfully repudiated the purported factual bases presented in the book for this implication, e.g., the concentrated afternoon pitching practice sessions did not take place as described; it was not true that "daily baseball sessions with his father were the rule during the season" (p. 16) nor consequently was the lengthy portrayal of these sessions accurate; the story of Ed Spahn's promise and gift to Spahn of a new first baseman's mitt never occurred; Spahn's father did not teach the boy to pitch; plaintiff never consulted his father concerning the signing

of his first baseball contract; his mother, not his father, signed the necessary legal papers. As a consequence, the lengthy and vividly descriptive scenes describing the author's misconceptions of the foregoing basic facts must be classified as fictional.

As a further manifestation of the author's invented conception of the relationship between Spahn and his father, the author devotes Chapter Four to a grim portrayal of the supposed grave psychological effect of Spahn's injury to his elbow (which the author erroneously and repeatedly describes as a shoulder injury) upon the elder Spahn. The book at page 42 describes the following conversation, allegedly between Spahn and his father's physician:

> "'This, well—breakdown let's call it—might have happened at any time, for any number of similar reasons. No, Warren, it would be morally wrong, in my opinion, to fix the blame for your father's illness on your misfortune.
>
> "Warren nodded grimly. 'What you're trying to tell me is it's not my fault that it's my fault, isn't that right, Doctor? That my getting hurt was kind of the straw that broke Pop's back?'"

Plaintiff categorically controverted the express references and innuendoes concerning his father's illness which plaintiff described as a normal post-operative recovery, and defendants were unable to rebut his position. Consistent therewith, he unequivocally denied that the aforesaid scene or any resemblance thereto had, or could ever have, taken place. Consequently, the dramatic portrayal of the "guilt-ridden" son represents but another of the book's interesting, artistic but undeniable flights into fantasy.

With respect to the plaintiff's courtship and marriage, most aspects of the author's presentation were emphatically branded by plaintiff as untrue; e.g., Spahn's reaction to his now wife at their first meeting, the dramatization of supposed obstacles to their marriage plans and other difficul-

ties. Particularly indicative of the highly romanticized and non-factual version of this relationship is the following scene at pages 67-68 between Spahn and his fiancee depicting his surprise return from Europe:

> "The weeks passed and the Braves received no word from Warren. The season opened—and still no Spahn. Then, in Tulsa one evening, Lorene Southard was just sitting down to dinner when the doorbell rang. 'Now who can that be?' she said aloud to herself. She strode briskly across the room and opened the door. A startled cry escaped her lips.
>
> "'Warren!' she gasped.
>
> "'Surprise!' Spahn cried. He swept Lorene off her feet and carried her into the room. 'Surprise! Surprise!' he kept shouting as he swung her around in his arms.
>
> "'Warren! Warren!' she laughed and cried at the same time. 'Put me down!'"
>
> "The two of them fell onto the sofa in a laughing tangle."

In fact, Spahn telephoned Lorene of his arrival, was met at the train station by her, and both then went out to dinner.

With respect to the book's description of Spahn's concern over the problems attendant upon the birth of his son, the plaintiff established that both in factual detail and conclusory import the following passages, amongst others, were false or grossly distorted:

> "* * * whenever the Braves' road games were against an eastern team, Warren flew home between pitching assignments to be with his wife." (p. 85)
>
> "On the western swings, Warren sat fidgeting on the bench, his uneasy mind a thousand miles away. Often, in the middle of a game, he would bolt from the dugout, rush into the clubhouse and call home to assure himself that Lorene was all right. His pitching was so bad that he didn't even make the National League's All Star team that year." (p. 85)

"The pressure was on. All over. The Spahn's child had been expected around the end of August, but the days went into September and still there was no sign. Warren was becoming frantic." (p. 91)

Once again, the defendants were unable to overcome plaintiff's factual objections to the recurrent portrayal of the "frantic" Spahn, the hypersensitive individual, emotionally overwhelmed by his personal problems to the detriment of his role as a member of a team.

Concerning the depiction of his baseball career, plaintiff rightfully took exception to a multitude of factual errors, distortions, and recitations out of context, which are so extensive and varied that in the interest of keeping the size of this opinion within the bounds of propriety, reference must be made to the record in the case. The court, however, feels that mention must be made of the fact that scenes and dialogue were invented by the author, inaccurately depicting plaintiff's professional relationship with Casey Stengel, Jackie Robinson, Lew Burdette, Phil Masi and with his teammates as a whole.

While untrue statements do not necessarily transform a book into the category of fiction, the all-pervasive distortions, inaccuracies, invented dialogue, and the narration of happenings out of context, clearly indicate, at the very least, a careless disregard for the responsibility of the press and within the context of this action, an abuse of the public's limited privilege to inquire into an individual's life.

An equal degree of departure from any factual basis is presented by the introspective revelations and feelings on the part of the plaintiff, which passages are liberally sprinkled throughout the book. The plaintiff denies that he ever entertained these thoughts. Recitation, at random, of some of these invented thoughts indicates the extreme, and the court finds, fanciful nature of their import:

"'this time I won't let you down, Pop,' he resolved as the cool stream bathed his dust-caked lips. 'This time I won't let you down.'" (p. 49)

"His confidence began to slip. He wasn't sure he could put the ball where he wanted to anymore. He was afraid to try for the corners, afraid to throw the fast balls, afraid he was through." (p. 141)

"The whole thing was in his mind. There was nothing to do but find his own way out of the trap he'd made for himself." (p. 141)

"Good thing the hitters didn't know how bad my legs were last year, he thought after a while. They'd have bunted me right out of the league. As it was, they did a pretty good job of it, he recalled sourly. Only seventeen wins—first time he didn't win twenty with Milwaukee—and fourteen losses." (p. 142)

"Then the feeling had turned to fear. Then desperation. Finally, he even began to feel a little sorry for himself." (p. 144)

The full significance of these attributed thoughts and feelings emerges when viewed within the context of paragraphs implying plaintiff's excessive interest in his own career as an individual and not as a member of a team and within the context of a recurrent implication and the express statement that Spahn was "obviously on the verge of a breakdown." (p. 94)

At the trial, the author testified that with regard to the writing of "THE WARREN SPAHN STORY", he had never interviewed Mr. Spahn, any member of his family, friends, or any baseball player who knew the subject of the instant "biography", nor did he attempt to obtain information from the Milwaukee Braves, the baseball team of which plaintiff was, and is, a member. Newspaper articles, magazine stories and general background books constituted the sole source of the author's factual bases for his work. The author admitted that he relied upon the "accuracy" and "competency of the people whose articles I read." Of even more crucial significance, the author states, "I created dialogue based upon a secondary source."

That the foregoing procedure outlined by the author constitutes the customary practice affords no basis for legal justification of defendants' transgression and appropriation of plaintiff's name, portraiture and picture for purposes of trade. Nor, especially in view of the multitude of overlapping offending characteristics of the book, does the contract in which Spahn agreed "that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and agrees that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes in any manner it desires" efface, insofar as the defendants are concerned, the line of demarcation between the permissible and forbidden areas of unauthorized publicizing of Spahn's life (see *Redmond* v. *Columbia Pictures Corp.*, 277 N. Y. 707; *Franklin* v. *Columbia Pictures Corp.*, 271 N. Y. 554; *Feeney* v. *Young*, 191 App. Div. 501; *Loftus* v. *Greenwich Lithographing Co., Inc.*, 192 App. Div. 251).

The book, jacket and pictures were all published without Spahn's consent. The court also finds that the record unequivocally establishes that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual errors, distortions and fanciful passages, only relatively few illustrative portions of which are specifically set forth herein. Although so tightly interwoven as to defy extrication of the one from the other, the offending characteristics of the book comprehend a nonfactual novelization of plaintiff's alleged life story and an unauthorized intrusion into the private realms of the baseball pitcher's life—all to Spahn's humiliation and mental anguish.

The subject purported biography transgresses the bounds of legitimate public interest by its breadth of reportorial coverage of those areas of plaintiff's life which defy classification as public, i.e., his deeply personal relationships with members of his immediate family and his

introspective thoughts. Quantitatively, these trespasses upon plaintiff's private life represent a substantial portion of the book now under scrutiny. Qualitatively, the colorful portrayal of the intimate facets of Mr. Spahn's relationship with his father and his wife and the revelations of his innermost thinking (e.g., the plaintiff's crucial role in the highly emotional and psychological atmosphere enveloping his father's illness, the detailed intimate courtship scenes and difficulties, plaintiff's reaction to his wife's troublesome pregnancy) in many instances places the reader in the uncomfortable position of an embarrassed interloper upon another's private and personal domain.

Compounding the effect of these unlawful intrusions, plaintiff's uncontroverted testimony and evidence establish that factual errors so pervade and permeate these areas as well as the entire book as to render the whole story an "embroidered" and "embellished" version of Mr. Spahn's life (Cf. *Sidis* v. *F. R. Pub. Corp.*, 113 F. 2d 806, cert. den. 311 U. S. 711).

Evaluation of the literary attainments of this work falls beyond the judicial province, but critically pivotal to the determination that the book violates the interdiction of Article 5 of the Civil Rights Law is the compelling conclusion that the writing constitutes a product—a creation, both in *form* and *content*—of the author's artistic imagination.

In effect then, the defendants have used Spahn's name and pictures to enhance the marketability and financial success of the subject book of which approximately 16,000 copies were sold at the retail price of $3.25 per copy. (For a discussion of appropriation—unjust enrichment, see Gordon, *"Right of Property in Name, Likeness, Personality and History"*, 55 Northwestern University L. R. 553.)

To return to the four category definition of "Privacy" by Dean Prosser, defendants have (1) intruded upon the plaintiff's solitude and into his private affairs, (2) disclosed embarrassing "facts" about the plaintiff, (3) placed the

plaintiff in a false light in the public eye, and (4) appropriated, for defendants' advantage, the plaintiff's name and likeness. Such intrusion, disclosure and appropriation for commercial exploitation are proscribed by section 51 of the Civil Rights Law.

Accordingly, plaintiff is entitled to the relief sought; to wit, injunctive relief preventing the further publication and distribution of THE WARREN SPAHN STORY in all its aspects and phases and is entitled to damages against both defendants in the sum of Ten Thousand Dollars ($10,000) and costs.

The foregoing constitutes the decision of the court. Settle judgment.

Dated: May 28, 1964

Filed
May 28, 1964
New York
County Clerks Office

J. M.
J.S.C.

APPENDIX E

Order on the Motion

SUPREME COURT

OF THE STATE OF NEW YORK

SPECIAL TERM—PART I

NEW YORK COUNTY

At the Courtouse thereof, 60 Centre Street, New York, New York, 10007.

Present: HON. JACOB MARKOWITZ, Justice.

June 24, 1964.

WARREN E. SPAHN,

against

JULIAN MESSNER INC. *et ano.*

The following papers numbered 1 to 4 read on this motion, submitted. No. 157 on Calendar of June 24, 1964.

	PAPERS NUMBERED
Notice of Motion and Affidavit annexed	1–2
Answering Affidavit	3
Filed Papers (memo decision of 5/28/64)	4

Upon the foregoing papers this motion for an order amending the decision heretofore entered, to include interest and exemplary damages is denied. Due consideration was given to the conclusion of these items in the Court's determinations and decision rendered, and they were not allowed.

Dated: Juy 7, 1964

J. M.
J. S. C.

Filed: July 7, 1964
New York County Clerk's Office

APPENDIX F

Table of Comparison between References in the book and Appellee's oral testimony[1]

REFERENCE IN "THE WARREN SPAHN STORY"	"FICTIONALIZATION" ALLEGED BY SPAHN
1. Spahn was awarded the Bronze Star (B. 65).	Spahn was not awarded Bronze Star; he was awarded Purple Heart (R. 101). (Testimony established that Sport Magazine had earlier published an article stating Spahn had received Bronze Star (R. 100)).
2. Narration of incident in which Spahn pitched to Jackie Robinson in first game of doubleheader on August 21, 1948 (B. 87-89).	Spahn "wasn't aware that this situation existed." Spahn pitched to Robinson on Labor Day, not August 21 (R. 64).
3. Boston Catcher Phil Masi discussed pitching strategy with Spahn during game (B. 88-89).	Spahn didn't have conversation with Masi as described in book (R. 72).
4. Spahn struck out Robinson in 6th inning of game (B. 89).	Spahn doesn't know whether he struck out Robinson at that time (R. 71).
5. Spahn's Fast Ball reappeared during the Aug. 21, 1948 game (B. 89).	Spahn's Fast Ball returned during the 5th game of the 1948 World Series (R. 71).

[1] References are to *The Warren Spahn Story* (B.) and the Record (R.)

6. German Stukas bombed the Remagen Bridge while it was being repaired by a platoon of engineers, of which Spahn was a member (B. 9).	Spahn doesn't believe that the German planes were Stukas (R. 103).
7. Spahn injured his shoulder while playing for a Bradford, Pa. team (B. 33).	Spahn injured his elbow while playing for Bradford (R. 81).
8. Spahn's father appeared badly shaken by Spahn's bad luck (B. 34).	Spahn's father did not suffer ill health because of Spahn's injury, "other than feeling for my future, whether my career was in jeopardy" (R. 81).
9. Narration of conversation with Mother about running faster to baseball than to school and having a glass of milk first before baseball (B. 16).	Conversation with mother set forth in book is "conceivable" and "very likely," but not a true statement of fact (R. 111).
10. Spahn yelled "down" to the men under his command on Remagen Bridge (B. 10).	The underlying facts are accurate (R. 249-53) but the narration "contains a particular situation that I have no recollection of happening, although it could have happened . . ." (R. 252).
11. The engineers worked calmly throughout the bombardment at Remagen Bridge (B. 9).	Spahn doesn't believe the engineers worked calmly (R. 256).

12. Spahn went from man to man, urging them on (B. 9).	Spahn probably urged his men to work, "but not man to man" (R. 257-8).
13. Spahn saluted two officers who remained in open during Stuka attack (B. 11).	Spahn did not salute officers (R. 276).
14. Officer blew clouds of smoke at ceiling (B. 12).	Spahn didn't know whether officer smoked or not (R. 278).
15. Spahn felt a slap of air against him from the explosion of artillery shell; he staggered, felt clods of earth pelt him, felt steel fragments in his foot and fell (B. 13).	Spahn didn't know whether clods of earth rose from shell striking ground, didn't feel explosion, didn't know he was hit, and didn't fall (R. 284-286).
16. Spahn recalled Casey Stengel remark "that Spahn can become one of the best left-handers in the business" (B. 13).	Stengel never told Spahn that he could become a great lefthander (R. 293); Spahn states that he learned of comment on his return to U. S. (R. 297).
17. Army Medics carried Spahn on stretcher after he was wounded (B. 14).	Spahn was never placed on a stretcher; he was ambulatory (R. 298-9).
18. A friendship had developed between Spahn and Bill Kelley (B. 18-19).	Spahn was not Kelley's friend; he was an "admirer" of Kelley (R. 317).
19. Baseball Scouts were on Spahn's trail (B. 25).	Only one scout was interested in Spahn (R. 339).

20. Spahn's pitching was wild upon his return, but he gradually narrowed his buckshot pitches to the approximate limits of the strike zone (B. 48).	Spahn could pitch at least around the strike zone; buckshot implies all over the place (R. 360).
21. Casey Stengel remarked to a baseball writer that Spahn is going to be a great pitcher, if nothing happens to him; Spahn recalled the remark during the war (B. 60).	Spahn was not thinking about the war (R. 380).
22. GI was sitting next to Spahn shining his shoes (B. 63).	Text is untrue (R. 388).
23. Spahn was wounded on March 17, 1945 (B. 66).	Spahn believes the date to be March 10 (R. 391). There is some indication in the record that War Dept. records confirm the date as March 17 (R. 391).
24. Spahn called John Quinn in Pittsburgh in connection with rejoining the Braves (B. 70).	Spahn called Quinn in Boston (R. 393).
25. The description of individual pitches thrown by Spahn (B. 74).	Spahn labels the description of each pitch untrue (R. 402-407).
26. Vern Bickford had a "fair minor league record" (B. 82).	In Spahn's opinion, Bickford had a "good minor league record" (R. 430).

27. The Braves team in 1948 hardly inspired pennant dreams (B. 83).	Spahn says that Braves were picked to win pennant in 1948 (R. 431).
28. The bonus awarded Antonelli was resented by some Braves veterans (B. 83).	There was no resentment on team because of Antonelli's bonus, although players were disappointed at not getting salary raises (R. 433).
29. "The hop seemed to be gone from his fastball and the hitters were pasting him all around the league" (B. 84).	Spahn's pitching in general was bad, not particularly his fast ball (R. 434).
30. Much advice given Spahn was conflicting, amateurish and nonsensical (B. 84).	Advice wasn't all amateurish and nonsensical (R. 437).
31. Spahn flew home between pitching assignments to be with his wife (B. 85).	Spahn took a train, rather than flew (R. 441).
32. Description of second game of Aug. 21 doubleheader (B. 86).	The entire game took place on Labor day rather than Aug. 21 (R. 445).
33. Catcher Masi "lumbered" back to home plate (B. 88).	Masi "waddled" rather than "lumbered" back to home plate (R. 448).
34. Description of Spahn's introspective thoughts after being relieved while sitting on bench (B. 99).	Spahn was taken out of the game, but didn't think about the pitching he had just done until later (R. 476-77).

35. Potter's curve ball was "hanging a little" (B. 101).	Potter was a screwball pitcher (R. 481).
36. Manager Southworth walked slowly to the pitcher's mound (B. 100).	Southworth never walked slowly (R. 482).
37. Spahn was responsible for the decision, after score tied, and he set to work with renewed determination (B. 102).	Spahn was determined to win from the beginning, not merely when the score was tied (R. 487).
38. Cleveland second baseman swung and missed at a fast ball (B. 103).	Cleveland second baseman swung and missed at a curve ball (R. 495).
39. Fast balls shot from Spahn's left arm (B. 104).	Pitches are thrown from the hand, not from the arm (R. 496).
40. Spahn went out to pitch, angry at himself and the Indians (B. 108).	Spahn was not angry, he just had a job to do (R. 504).
41. Dissension on Braves had been building from previous season (B. 111).	No dissension on Braves team (R. 505).
42. Manager Southworth was a strict disciplinarian; formal, distant, often nervous and inconsistent (B. 111-112).	Southworth was not a strict disciplinarian, distant, nervous and inconsistent (R. 505-507).
43. Southworth couldn't control antagonistic faction on team (B. 115).	Players questioned Southworth's judgment regarding the game, but weren't antagonistic (R. 524).

44. Perhaps remembering a 2-1 loss to Dodgers in 16 innings, Spahn determined to hold Cubs scoreless; he was tired of losing extra-inning ball games (B. 119-120).	Spahn doubts that in the course of one game you refer to another (R. 521).
45. Spahn was unaware that he had set a strike out record (R. 121).	Spahn was aware that he struck out 18 men, but was unaware that it constituted a National League Record (R. 535).
46. "Meager, apathetic" crowds came to see Braves play (B. 126).	Crowds were "small" rather than "meager," and they weren't apathetic (R. 566-67).
47. Spahn pitched a good fast ball (B. 129).	Pitch referred to was a curve (R. 573).
48. After some deliberation, Spahn decided to develop a "sinker" pitch (B. 145).	Spahn didn't suddenly decide that he was going to develop a sinker; it was a gradual process of trial and error (R. 587-88).
49. Spahn tried more than 100 sinkers in practice before he tried one in a game (B. 145).	Spahn threw thousands of sinkers (R. 590).
50. Spahn threw his first sinker in a 1956 game (B. 143-46).	Spahn threw a sinker in 1951 or 1952 (R. 592).



MOTION FILED
APR 4 1967
LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,
Appellants,

—v.—

WARREN E. SPAHN,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae
120 Broadway
New York, New York 10005

22 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

TABLE OF CONTENTS

	PAGE
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
BRIEF AMICUS CURIAE	5
Introductory Statement	5
The Questions Presented	6
POINT I—(a) Material and substantial falsification is the threshold test under the Time, Inc. rule. (b) That test is not the same as "minor errors in an otherwise accurate (report)" or "fictionalization"	7
POINT II—Invented dialogue which does not amount to "material and substantial falsification" should not be denied protection of the First Amendment	10
POINT III—A state may not use the remedy of injunction to punish a violation of the right-of-privacy law	12
POINT IV—An author's use of material derived from public secondary sources should not expose him to liability under a right-of-privacy statute	13
POINT V—Publication of non-defamatory statements concerning "voluntary" public figures, which do not intrude upon their private lives, are entitled to full First Amendment protection	14
POINT VI—The ambiguity of the New York statute and decisions	15
CONCLUSION	16

Authorities Cited

Cases

	PAGE
Dombrowski v. Pfister, 380 U.S. 479	16
Freedman v. Maryland, 380 U.S. 51	12
Jacobellis v. Ohio, 378 U.S. 184	9
Louisiana v. N.A.A.C.P., 366 U.S. 293	12
People v. Bookcase, Inc., 14 NY 2d 409	15
People v. Kahan, 15 NY 2d 311	15
Time, Inc. v. Hill, U.S. , 17 L. Ed. 2d 456 (1967)	1, 2, 5, 6, *passim*
Winters v. New York, 333 U.S. 507	15

Statute

New York Civil Rights Law, Secs. 50-51	5

Miscellaneous

Webster's New International Dictionary, Second Edition	8
. . . And Then I Told The President, by Art Buchwald (G. Putnam & Sons, New York 1965)	11
Straight Herblock, by Herbert Block (Simon & Schuster, New York 1964)	11

IN THE

Supreme Court of the United States

October Term, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,

Appellants,

—v.—

WARREN E. SPAHN,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Authors League of America, Inc. respectfully petitions for leave to file the annexed brief *amicus curiae* in this proceeding.

The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express the views of its members in cases involving the rights of free speech and press. Because determination of the issues involved in this case will significantly affect those fundamental rights, the Authors League respectfully applies for leave to file its brief *amicus curiae*.

Counsel for the Applicant is familiar with the questions involved in this case, and the scope of their presentation, and believes that there is necessity for additional argument on the points specified in the brief.

While this Court, in *Time, Inc.* v. *Hill*, U.S. 17 L. Ed. 2d 456 (1967), discussed the New York Court of

Appeals decision in the instant case, there still remain unanswered substantial questions concerning the reach of the statute and the limitations imposed by the First and Fourteenth Amendments upon its application.

These questions involve potential restraints on freedom of speech and press in major areas of public interest. If the scope of First Amendment protection against these restraints is not clarified and made more precise (or, indeed, if these questions are left unanswered), authors of biography, history, social commentary, and political analysis and criticism will continue to be exposed to the threat of "right of privacy" suits designed to suppress books. The restraints imposed by the New York Court of Appeals opinions here and in *Time, Inc.* are not limited to novels or plays; they apply to all forms of writing. Indeed, despite the confusing label "fictionalization" used by the New York opinions, appellant's book is clearly not a novel, but a biography (albeit to some degree inaccurate). Should these questions remain unanswered, the inevitable result will be a stifling self-censorship, imposed by the unwillingness of authors and publishers to spend large sums to defend such actions, the fear of damage awards, and the possibility of heavy losses should a court enjoin continued sale of a work —pending or following the trial.

For example, the New York decision might bar much political and social criticism, particularly satire, parody and cartoons. In these literary forms, public figures are depicted in "fictionalized" situations, i.e., they are portrayed or described as doing things they never actually did; and uttering dialogue the author wrote to communicate their expressions and thoughts ("invented dialogue"). Under

the New York rule political cartoons, satire and parody may well be deemed "fictionalization" and therefore punished by an award for damages, and restrained by an injunction.

Similarly, under the New York rule, authors and publishers face the risk of suit if a biography or current history employs any so-called "invented dialogue."

Among the other questions still unanswered: (1) whether New York may, in any event, employ the remedy of injunction to restrain publication of a book or magazine which contains material that goes beyond the boundary of First Amendment protection this Court established in its *Time, Inc.* decision; and (2) whether the same tests apply to private persons who are involuntarily exposed to public view (the Hill Family) and individuals who, by their own voluntary activities, become public figures (Mr. Spahn).

Counsel for the Authors League has been advised by Appellant's attorney that he has no objection to the filing of the within brief *amicus curiae*. Counsel for Appellee has advised the League's attorney that he does object to the filing of the brief.

Because the Authors League of America believes that the still unanswered questions in this area pose serious threats to freedom of speech and press, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc.

IN THE

Supreme Court of the United States

October Term, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,

Appellants,

—v.—

WARREN E. SPAHN,

Appellee.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., *AMICUS CURIAE*

Introductory Statement

Mr. Justice Brennan's opinion in *Time, Inc.* v. *Hill*, U.S. , 17 L. Ed. 2d 456 (1967), leaves no doubt that the biography of a public figure like Mr. Spahn is a report on a matter of public interest and therefore protected by the First Amendment against liability under the New York statute (Civil Rights Law Secs. 50, 51)—unless it transcends the boundary lines established by this Court in *Time, Inc.* Since the New York courts did not consider these criteria, this Court should note probable jurisdiction to reverse the judgment and establish beyond doubt that the *Time, Inc.* rule applies to so-called "unauthorized" biographies of public figures.

But beyond this, we respectfully submit that the Court should take jurisdiction to resolve basic First Amendment questions, posed by the decision below, which were not disposed of by *Time, Inc.* v. *Hill, supra.*

The Questions Presented

We respectfully submit that this appeal poses the following questions:

1. With respect to the *Time, Inc.* test:

   (a) Is the author of false statements (concerning a matter of public interest) which are not "material and substantial falsification" protected by the First Amendment, without regard to whether published with knowledge of their falsity or in reckless disregard of the truth?

   (b) Is this Court's test of "material and substantial falsification" different from the New York tests: "fictionalization" or "minor errors in an otherwise accurate (report)"?

2. Is "invented dialogue" which does not amount to "material and substantial falsification" protected by the First Amendment under the *Time, Inc.* test?

3. May a state use the remedy of injunction to enforce its right of privacy laws?

4. If "invented dialogue" or other inaccuracies derive from an author's reliance on published secondary sources, can such reliance constitute "reckless disregard of the truth"?

5. Can a state prevent publication of non-defamatory statements concerning a public figure, truthful or not, which do not intrude upon intimate details of his private life?

6. Are the New York Statute, and the decisions which expanded its scope to apply here, so vague and ambiguous that they violate the First and Fourteenth Amendments?

POINT I

(a) Material and substantial falsification is the threshold test under the *Time, Inc.* rule.

(b) That test is not the same as "minor errors in an otherwise accurate (report)" or "fictionalization."

(a) We submit that the decision in *Time, Inc.* v. *Hill*, U.S. , 17 L. Ed. 2d 456 (1967), requires as a first, and threshold, Constitutional test that, to be actionable, false statements must constitute "material and substantial falsification" (17 L. Ed. 2d, at 466); and if they do not, then they cannot be punished under the New York statute regardless of whether they were made with knowledge of their falsity or in reckless disregard of the truth. If a public figure, seeking to restrain a book about himself, wishes to use the process of restraint inherent in a right of privacy suit—it would require no great skill in pleading by his attorney to create "issues of fact" concerning the author's alleged wilfulness or reckless disregard of the truth on innumerable statements which the plaintiff might claim to be false. The author and publisher could thus be put to the costly burden of proving—in pretrial proceedings and at the trial—that every challenged statement was not knowingly false or made recklessly. This threat, and the danger of failing to satisfy the jury as to the *bona fides* of each statement constitute potent deterrents to free speech.

We respectfully submit that the restrictive effects of such a process constitute too great a threat to First Amendment freedoms to be tolerated in connection with statements which are not "material and substantial falsifications";

and that authors and publishers should not be subjected to such a burden, and the consequent restraints it produces, with respect to statements that are not "material and substantial falsifications"—regardless of whether they were made knowingly or in reckless disregard of the truth.

(b) We respectfully submit that this Court's test of "material and substantial falsification" provides far greater First Amendment protection than the criteria applied below—and that this should be made clear.

The Court of Appeals only conceded that "minor errors in an otherwise accurate" report did not prove "fictionalization." This allows scant margin for error; and only a grudging and small portion of the precious "breathing space" for freedom of expression afforded by the Constitutional protection for erroneous statements. (*Time Inc.* v. *Hill*, 17 L. Ed. 2d, at p. 467.) "Minor errors in an otherwise accurate [report]" is far more restrictive and limiting than the *Time, Inc.* test. "Material" means "Of solid or weighty character; substantial; of consequence; not to be dispensed with; important" (Webster's NEW INTERNATIONAL DICTIONARY, Second Edition). The alleged misstatements in defendant's book can hardly be deemed "material" in this sense (see Appendix F—Appellants' brief). On the contrary, the more appropriate label for this miscellany of minor error and petty inaccuracy would be—"trivial".

The ambiguous phrases employed by the New York courts will inevitably result in imposing liability on books which do not, taken as a whole, involve the substantial degree of falsification which could possibly justify denial of

First Amendment protection. "Fictionalization" which the Court of Appeals said was "at the heart" of the cases, is a particularly confusing guideline to use in determining this critical Constitutional issue. The question is not whether the First Amendment permits an author to name and use the plaintiff as a character in a novel about baseball. This was not done; and this is not the issue in this case. Appellants' book is patently not a novel or a play. It is a biography of plaintiff; it deals with him and real people involved in his life (it has no fictitious characters); it deals with events in his life (it does not have an artificial plot). The book's factual errors and "invented dialogue" may make it "inaccurate"; but they do not make it a novel.

"Fictionalization," in this context, is a catchword which begs the fundamental question—whether the book's inaccuracies, including its "invented dialogue," amount to "material and substantial falsification" so that if the author made such statements knowingly or recklessly, he can be penalized by an award for damages (even though —it should be added—he did not commit defamation and did not invade the plaintiff's "right of privacy" in the Brandeis-Warren sense of the phrase.)

We submit that a reading of the book—pursuant to this Court's policy that the question of whether it be denied First Amendment protection involved a mixed question of law and fact (*Jacobellis* v. *Ohio*, 378 U.S. 184 (1964))—will disclose that the inaccuracies complained of do not constitute "material and substantial falsification".

POINT II.

Invented dialogue which does not amount to "material and substantial falsification" should not be denied protection of the First Amendment.

The New York opinions seem to suggest the use of "invented dialogue" in a work of non-fiction *per se* subjects it to liability under the New York statute. We believe that the Court should make it clear that this narrative technique cannot *per se* be denied protection under the First Amendment. An author may report someone's conversation in the third person; or may seek to convey the substance of it by casting it in the first person and employing quotation marks. In either form, his report of the conversation may be accurate, or partially accurate, or completely false. The use of dialogue has frequently been employed in biographies, histories, and other works of non-fiction and reportage; and has never been limited to reporting only conversations which the author himself heard or which were reported to him *in haec verba* by "ear witnesses."

We respectfully submit that under the *Time, Inc.* test, the issue is whether reports of conversations—whether in narrative or dialogue form—amount to "material and substantial falsification." If they do not, they should be protected under the First Amendment. We urge that the Court make clear that "manufactured dialogue" is protected by the First Amendment unless it transcends the *Time, Inc.* test. Unless this be the rule, constitutional protection would also be denied to other forms of literary and artistic comment upon public figures involved in political and social issues. Criticism, satire and parody frequently employ "manufactured dialogue." It is obvious that such

forms of expression are protected by the First Amendment. (And, they cannot be distinguished, on Constitutional grounds, from a book, such as Appellants.) For example:

> . . . AND THEN I TOLD THE PRESIDENT, by Art Buchwald (G. Putnam & Sons, New York 1965) is a collection of the author's newspaper columns. Some of these are devoted almost exclusively to repeating, verbatim, "conversations" between President Johnson, Barry Goldwater and Hubert Humphrey (p. 8), President Johnson and Secretary McNamara (p. 8), President Johnson at a press conference (p. 25), President Johnson and Robert Kennedy (p. 39), and Mr. Kennedy and Stephen Smith (p. 55). None of these conversations ever took place; all the incidents were "imaginary"; the dialogue was "manufactured"; the treatment of the living subjects was not always flattering.
>
> STRAIGHT HERBLOCK, by Herbert Block (Simon & Schuster, New York 1964) contains a cartoon (p. 177) showing a recent national political candidate, clearly identified by the accurate drawing of his features (and his initials on his attaché case) speaking to a mother and three children, dressed in rags and huddled on the steps of a shanty: "If you had any initiative, you'd go out and inherit a department store." As is the case with most of the cartoons in the book, and many cartoons about public figures in sports, business, religion, politics, and other fields, the incident was "imaginary," and the dialogue "manufactured."

POINT III

A state may not use the remedy of injunction to punish a violation of the right-of-privacy law.

Under the New York statute, the Court may enjoin a publication or further sale of a book which violates the right-of-privacy statute. We respectfully submit that this remedy is unconstitutional. In *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 296, the Court said:

> "We are in an area where, as *Shelton* v. *Tucker*, 364 U.S. 479, emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: '. . . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "

See also *Freedman* v. *Maryland*, 380 U.S. 51.

We respectfully submit that even to the extent that a State may redress violations of the "right of privacy", that limited purpose cannot constitutionally be achieved by employing the remedy of injunction. This is too great a restraint to impose upon the right of freedom of expression. In this connection it is significant that courts have traditionally refused to enjoin the publication of a libel, and confined the remedy to an award of damages.

POINT IV

An author's use of material derived from public secondary sources should not expose him to liability under a right-of-privacy statute.

If authors were compelled to write only on the basis of first-hand knowledge of a person or of events, production of biography, history and other forms of socially important works of non-fiction would be drastically curtailed. The author of a biography or history has neither the time nor the means to verify the accuracy of all secondary sources he uses; and it would be socially undesirable to prevent him from being free to rely on those sources. However, if he is only able to do so on penalty of right-of-privacy liability—should the sources prove inaccurate, and he be unable to convince a jury that he was not wilful or reckless—then research, writing and publishing will be seriously curtailed.

It must be remembered that this whole area of liability contains no visible danger signals: at least, an author or his publisher has some warning that particular and comparatively limited types of statements may constitute libel if they are not true. But almost any conceivable statement, if not true, would under the New York rule be an invasion of privacy.

We respectfully urge that the Court make it clear that an author is entitled to use published, and other reputable, secondary sources; and that his reliance upon them precludes a finding of wilful falsity or reckless disregard of the truth.

POINT V

Publication of non-defamatory statements concerning "voluntary" public figures, which do not intrude upon their private lives, are entitled to full First Amendment protection.

In *Time, Inc.* v. *Hill,* the Court the allegedly false report concerned private citizens whose private life became, without their choice, a matter of public interest. An entirely different question is presented in this case. As the New York Court of Appeals acknowledged, a person who becomes a public figure through his own voluntary efforts is "substantially without a right of privacy."

We respectfully submit that the New York courts, however, have drastically departed from this concept in holding that the author of an unauthorized biography of such a public figure loses his Constitutional protection because of errors or misstatements—even though it does not expose to public view truly intimate details of his private life.

In *Time, Inc.* v. *Hill,* this Court said:

> "But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us." (17 L. Ed. 2d at p. 469).

We respectfully submit the question is posed in this case; and that the Court should consider whether a different standard should apply—one that places less restraint on freedom of expression in a book concerning a "voluntary" public figure.

POINT VI

The ambiguity of the New York statute and decisions.

In *Winters* v. *New York*, 333 U.S. 507, this Court held that

> "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press." (pp. 509-510)

We respectfully submit that both the New York statute, and the New York decisions which expanded it are so vague, broad and indefinite in both respects that they violate the constitutional rights of authors and publishers and are therefore invalid under the *Winters* doctrine.

If liability were predicated on the statute alone, it would be unconstitutional under *Winters* v. *New York* (see also *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 417); *People* v. *Kahan*, 15 N. Y. 2d 311). Actually, the right of action enforced here was engrafted onto the statute by a series of decisions. We respectfully submit that *Time, Inc.* v. *Hill* did not answer two questions involving this process of judicial legislation: (1) whether it is permissible under the First and Fourteenth Amendments and (2) whether the opinions which created the new restraints are themselves so vague and ambiguous as to be unconstitutional under *Winters* v. *New York*.

This Court has previously indicated the obvious dangers to freedom of speech and press inherent in such a process

of piecemeal, case by case, definition. If authors and publishers must write and publish in fear that the right-of-privacy doctrine will receive new interpretations and developments, then books about public figures will steer far wide of the danger zone. (Cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 787 (1964).) We submit that the inherent and inescapable restrictive effect of a process of judicial amendment and extension of a statute imposing restrains on freedom of expression are totally incompatible with the First and Fourteenth Amendments. If any restraints in this area can be reconciled with the First Amendment, we submit that the only process by which they can be created is by legislation. Then, authors and publishers can at least be certain that the next decision will not extend the restraints beyond the limits set in the statute; they will at least know that they can write and publish within those limits; and they will at least be able to challenge the statute, if *on its face* it encroaches on areas protected by the First Amendment.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae

LIBRARY
COURT U. S.

APR 13 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,

Appellants,

—v.—

WARREN E. SPAHN,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

ARTHUR K. RADIN
Attorney for Appellee
6411 Landover Road
Cheuerly, Maryland

EARLE WARREN ZAIDINS
HARVEY J. MICHELMAN
STANLEY B. MICHELMAN
of Counsel

TABLE OF CONTENTS

	PAGE
Motion to Dismiss	1
Statement	1
Counter-question Presented	2
Counter-statement of Fact	3
A. Nature of the Action	3
B. Findings of Fact	3
C. Conclusions of Law	4
ARGUMENT	
No Substantial Federal Question Is Raised by This Appeal	5
A. Constitutionality of New York Privacy Statute Upheld in 1967	5
B. Appellants' Knowing and Reckless Falsity Proved	7
C. The Public Figure, While Afforded Little Privacy Protection, Is Safeguarded From the Fictitious Report Whether Its Subject Matter Be Defamatory or Nondefamatory	11
D. The Decision in *Time, Inc.* v. *Hill* Is Decisive and Controlling	13
CONCLUSION	13

Table of Authorities

PAGE

United States Constitution

First Amendment 2, 4-7, 9, 13

New York Civil Rights Law

Sections 50-51 ..... 2, 4-7, 9-10, 12-13

Chaplinsky v. *Garrison*, 315 U. S. 568 7

Garrison v. *Louisiana*, 379 U. S. 64 7

Spahn v. *Messner, et ano.*, 18 N. Y. 2d 324, aff'g 23 A. D. 2d 216, aff'g 43 Misc. 2d 219 ..... 2-4, 5-12

The New York Times v. *Sullivan*, 360 U. S. 254 ..... 6-7, 9

Time, Inc. v. *Hill*, —— U. S. ——, 17 L. Ed. 2d 456 ..... 2, 5-9, 11-13

IN THE

Supreme Court of the United States

October Term, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,

Appellants,

—v.—

WARREN E. SPAHN,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellee, Warren E. Spahn, moves to dismiss the appeal herein, pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that the appeal herein does not present a substantial federal question.

Statement

This is an appeal from a judgment of the Court of Appeals of the State of New York, dated October 27, 1966, unanimously affirming the judgment of the Appellate Division of the New York Supreme Court, First Department, dated June 6, 1965, which likewise unanimously affirmed the judgment of the New York Supreme Court, County

of New York, dated May 28, 1964, in favor of appellee, after trial without a jury, awarding him an injunction and money damages in the action brought under the New York Right of Privacy statute, §§50-51, New York Civil Rights Law.

The opinion of the Court of Appeals is set forth in "Appendix B" of appellants' jurisdictional statement, and is reported in 18 N. Y. 2d 324, 221 N. E. 2d 543. The opinion of the Appellate Division is set forth in "Appendix C" of the jurisdictional statement, and is reported in 23 A. D. 2d 216, 260 N. Y. S. 2d 451. The opinion of the trial court is set forth in "Appendix D" of the jurisdictional statement, and is reported in 43 Misc. 2d 219, 250 N. Y. S. 2d 529.

Counter-question Presented

The only question on this, appellee's motion to dismiss the appeal herein is whether appellants' jurisdictional statement presents a substantial federal question as warrants the Court noting probable jurisdiction.

It is respectfully submitted that the question should be answered in the negative.

Notwithstanding this Court's very recent pronouncement on the identical propounded constitutional question in *Time, Inc.* v. *Hill*, —— U. S. ——, 17 L. Ed. 2d 456 (January 9, 1967), appellants' appeal nonetheless again seeks review of the same statute, §§50-51, New York Civil Rights Law, and upon the very same constitutional grounds, to wit: that said statute abridges protections for speech and press.

Factually, the New York courts in the case at Bar, have construed the Right of Privacy statute to protect

a public figure from an unauthorized commercial exploitation of his personality not in the public interest. The findings of fact reveal that appellants did knowingly and with reckless falsity write and publish an intentionally fictionalized version of appellee-public figure's life story, without his consent and did also infringe on his intimate and non-public private life.

Counter-statement of Fact

A. *Nature of the Action.*

Appellee, Warren Spahn, a well-known professional baseball pitcher, sought an injunction and money damages against the unauthorized publication of a book entitled, "The Warren Spahn Story", purporting to be a true biography of his life. The case was tried without a jury and appellee was awarded $10,000. and was also granted an injunction. Judgment was unanimously affirmed initially by the Appellate Division and also in like manner by the Court of Appeals.

B. *The Findings of Fact.*

Sitting as sole trier of fact and law, the Court adduced and found from the evidence that appellants' book (1) was published without appellee's knowledge or authority (Appendix D, p. 17d, jurisdictional statement); (2) is a dramatized and non-factual version of appellee's purported life story (Appendix D, pp. 13d-14d, jurisdictional statement; see also Appendix C, pp. 3c-7c); (3) substantially and materially untrue (Appendix D, pp. 12d, 15d, 17d-18d, jurisdictional statement; see also Appendix B, p. 3b and Appendix C, pp. 3c-4c, 6c-7c); (4) inaccurate, distorted

and fantasied (Appendix D, pp. 17d-18d, jurisdictional statement); (5) substantially embodies, both quantitatively and qualitatively, intimate facets of appellee's life, including publication of untrue personal relationships with his family, distinct and quite apart from the truthful and otherwise newsworthy professional career, as well as placing appellee in a false light by use of invented and concocted introspectives in the revelation of his innermost and personal thoughts (Appendix D, pp. 15d-16d, 18d, jurisdictional statement); and (6) was written and published with knowledge of its falsity and in reckless disregard of the truth (Appendix D, pp. 15d-18d, jurisdictional statement; see also Appendix C, pp. 3c-5c).

C. *Conclusions of Law.*

Based on findings of fact and the trial record, the Courts below unanimously concluded, as a matter of law, that appellants' book, "The Warren Spahn Story", goes far beyond constitutionally protected reportorial dissemination, transmuting it into an unauthorized commercial exploitation of appellee's personality and thereby invades his right of privacy as statutorily protected in §§50-51, New York Civil Rights Law.

ARGUMENT

No substantial federal question is raised by this appeal.

A. *Constitutionality of New York Privacy Statute Upheld in 1967.*

In *Time, Inc.* v. *Hill,* —— U. S. ——, 17 L. Ed. 2d 456 (decided, January 9, 1967), the constitutionality of the New York Privacy statute (§§50-51, New York Civil Rights Law), was considered and sustained.[1]

Appellants acknowledge the Court's "extensive review of the New York Law in *Time, Inc.* v. *Hill*" (p. 9, footnote 1, juris. statement). Appellants likewise defer to a footnote where we are advised that the issue raised by their appeal is whether the New York law may be construed as to restrain publication of an unauthorized and substantially untrue version of a public figure's life in which he is "identified as its subject" (p. 9, footnote 1, juris. statement).

Preceding this Court's expression in the *Hill* case, the New York Court of Appeals, on October 27, 1966, delivered its opinion in this, the *Spahn* case.[2] Inasmuch as the iden-

---

[1] The judgment of the Court of Appeals was set aside and the case remanded for further proceedings not inconsistent with the opinion of the Court. The constitutional command, however, was "narrowly limited" to the trial judge's failure to instruct the jury that a "verdict of liability could be predicated only on a finding of knowing or reckless falsity in the publication of the Life article" (p. 22, maj. opin.).

[2] *Warren E. Spahn* v. *Julian Messner, Inc., and Milton J. Shapiro,* 18 N. Y. 2d 324, 221 N. E. 2d 543, aff'g 23 A. D. 2d 216, 260 N. Y. S. 2d 461, aff'g 43 Misc. 2d 219, 250 N. Y. S. 2d 529. The trial court's judgment in favor of appellee herein was unanimously affirmed, on the law and facts by both the intermediate and high appellate New York courts.

tical statute was questioned in both the *Hill* and *Spahn* cases, this Court's understanding of the New York courts' First Amendment construction in connection therewith was "materially" aided (p. 5, maj. opin.).

In the *Hill* case, as do appellants in the case at Bar, it was argued that the New York privacy statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without the finding of knowing or reckless falsity. Mr. Justice Brennan, fully cognizant of the totality of the thesis hypothecated and of the Court of Appeals' holding that the constitutional command of this Court in *New York Times* v. *Sullivan*, 360 U. S. 254, had no application in *Spahn*, nonetheless concluded (p. 22, maj. opin.):

> "The appellant argues that the statute should be declared unconstitutional on its face if construed by the New York courts to impose liability without proof of knowing or reckless falsity. Such a declaration would not be warranted even if it were entirely clear that this is the view of the New York courts."

In the *Hill* pronouncement of the statute's constitutionality, Mr. Justice Brennan ascertained (p. 22, maj. opin.):

> "The New York Court of Appeals, as the *Spahn* opinion demonstrates, has been assiduous to construe the statute to avoid invasion of the constitutional protections for speech and press. We therefore confidently expect that the New York courts will apply the statute consistently with the constitutional command."

Consequently, if the *Spahn* case, to the satisfaction of the Court in *Hill*, has demonstrated the New York courts' de-

termination to apply constitutional mandates in construing the privacy statute, the same *Spahn* case cannot, as Dr. Jekyll to Mr. Hyde, degenerate into the statute's assassin.

B. *Appellants' Knowing and Reckless Falsity Proved.*

Unlike the deceived, the fabricator is the first to know his own child. And the calculated falsehood, "knowingly and deliberately published" enjoys no constitutional immunity (*Time, Inc.* v. *Hill, supra,* pp. 14-15; *The New York Times* v. *Sullivan, supra; Garrison* v. *Louisiana,* 379 U. S. 64, 75; and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572).

Upon the trial herein, the author testified (1) that he invented dialogue, manufactured scenes from his imagination and concocted introspective thoughts falsely attributed to appellee solely for dramatic effect in order that the book be more commercially attractive to juveniles (Record, pp. 624-756), and appellants' counsel conceded these facts (Record, p. 689), as he concedes them now (pp. 4-8, juris. statement); (2) that his "inventions" such as dialogue and "introspective thoughts" were "created" by him "based upon a secondary source" (Appendix D, p. 16d, juris. statement), none of which were researched for accuracy nor competency and frequently were in conflict with each other; (3) that he never interviewed appellee, members of his family, friends, associates, fellow ballplayers, nor did he seek reliable information readily available from the publicity offices of appellee's baseball team, the National League nor the Baseball Commissioner's office (Record, pp. 637-648); and (4) that up to trial time, he had "written" a total of thirteen (13) books, twelve (12) of which were sport biographies in which he resorted to the identical technique of

Tom Swiftizing the subjects which were jointly selected by the author and publisher (Record, pp. 665-666).

The book consisted of a total of 2,909 sentences. Appellee's testimony, including his verified trial bill of particulars, which was subject to cross-examination, was that a total of 1,532 sentences, or approximately 53% of the total number of the book's sentences were untrue. An additional 895 sentences, or approximately 31% consisted of unsubstantiated conjectures drawn from the author's fertile imagination and based on his own recollection of the relevant historical era.

In other words, approximately 85% of appellants' book is non-factual. There can be no question here concerning the "substantiality" of appellants' fictional and thus commercial enterprise.

Concurring with the trial court, the Court of Appeals concluded that appellants' falsifications "go far beyond the establishment of minor errors in an otherwise accurate biography . . . " (Appendix B, p. 3b, juris. stat.). They establish "dramatization, imagined dialogue, manipulated chronologies and fictionalization of events" (Appendix C, p. 5c, juris. stat.). "Fictionalization" is the heart of the cases in point (*Spahn, supra,* at p. 328, 221 N. E. 2d 545). Mr. Justice Brennan ascertained "material and substantial falsification" as the "Test" (pp. 11-12, maj. opin., *Hill* case).

Based upon the evidence, the trial court deduced (Appendix D, p. 17d, juris. stat.):

> "• • • the record unequivocally establishes that the book publicizes areas of Warren Spahn's personal and private life, albeit inaccurate and distorted, and consists of a host, a preponderant percentage, of factual

> errors, distortions and fanciful passages . . . Although so tightly interwoven as to defy extrication of the one from the other, the offending characteristics of the book comprehend a non-factual novelization of plaintiff's alleged life story and an unauthorized intrusion into the private realms of the baseball pitcher's life . . . "

The trial court concluded (Appendix D, p. 18d, juris. stat.):

> "That the book violates the interdiction of Article 5, of the Civil Rights Law is the compelling conclusion that the writing constitutes a product . . . a creation, both in *form* and *content* . . . of the author's artistic imagination."

Appellants argue that in construing the privacy statute, the New York courts' denial of accepting as applicable the *New York Times* v. *Sullivan (supra)*, and now, *Time, Inc.* v. *Hill (supra)* edicts, requires this Court's constitutional annulment of §§50-51, New York Civil Rights Law. It is respectfully submitted that the suggestion is wholly without merit and must be rejected.

The findings of fact and record are replete with examples of the author's substantial inventions, creations and fabrications admittedly sired by him. This overwhelming attestation can only be denominated as appellee's proof of appellants' knowing and reckless falsity. Additionally, the trial court acknowledged (Appendix D, p. 15d, juris. stat.):

> "* * * the all pervasive distortions, inaccuracies, invented dialogue, and the narration of happenings out of context, clearly indicate, at the very least, a *careless disregard for the responsibility of the press* . . . ." (Emphasis supplied.)

Undoubtedly, the publisher shared with its author the latter's "knowing and reckless falsity" imbued in their work of fiction. Indeed, it was the opinion of the Appellate Division (Appendix C, p. 3c, juris. stat.):

> "In short, defendants made no effort and had no intention to follow the facts concerning plaintiff's life, except in broad outline and to the extent that the facts readily supplied a dramatic portrayal attractive to the juvenile reader."

Appellants urged upon the trial and subsequently that the creation of dialogue based on secondary sources and the other techniques were not original with them and therefore should be permitted to continue. Commenting upon this aspect, the trial court stated (Appendix D, p. 17d, juris. stat.):

> "That the foregoing procedure outlined by the author constitutes the customary practice affords no basis for legal justification of defendants' transgression and appropriation of plaintiff's name, portraiture and picture for purposes of trade."

Startling corroboration of appellants' knowledgeable bad faith is manifest by mere comparison of appellee's trial exhibits "A" and "A1". Exhibit "A" is appellants' original book and target of appellee's action commenced on July 28, 1958. The copyright therein reveals its publication in 1958. Exhibit "A1" differs from exhibit "A" in that the former is a subsequent edition containing an *additional Chapter* together with a *supplemental statistical appendix* bringing the book "up to date" in 1959, *one (1) year after appellee commenced his action!*

The testimony of Louis Scholder, an officer of appellant publisher, attests to six (6) printings of "The Warren Spahn Story". "The first printing, approximately April, 1958. The second, January, 1959. The third, December, 1960. The fourth, April, 1962. The fifth, June, 1962. And the sixth, August, 1963" (Record, p. 637).

Clearly then, appellants' knowledge of falsity is amply demonstrated to have been a calculated and deliberate conversion of appellee's personality.

C. *The Public Figure, While Afforded Little Privacy Protection, Is Safeguarded From the Fictitious Report Whether Its Subject Matter Be Defamatory or Non-defamatory.*

Claimants in both the *Spahn* and *Hill* cases were public figures. Whether such by choice or involuntarily nonetheless subjects the public figure to the "often searching beam of publicity and that in balance with the legitimate public interest, the law affords his privacy little protection" (*Spahn, supra,* at 328, 221 N. E. 2d 543, 544, cited at p. 9, maj. opin. *Time, Inc.* v. *Hill, supra*). This is not to say, however, that a public figure is wholly and irrevocably dedicated to the public domain, absent any right in and to himself (pp. 9-11, maj. opin., *Hill* case, *supra*).

The public figure, insofar as his career is dedicated to the public or is the subject of an item of legitimate public interest, is substantially without a right of privacy. But his personality may not be the subject of another's unauthorized commercial exploitation. This truism is understandably axiomatic whether the commercial exploitation be in the form of an unauthorized fictional story or the publication of an advertisement in which, without his approval,

the public figure's name or picture is used to endorse a product. Conversely, the New York privacy statute affords protection to factual disseminations of newsworthy persons and events (*Spahn, supra,* at 328, 221 N. E. 2d 543, 545, cited at p. 11, maj. opin. in *Hill* case).

As a public figure, appellee is newsworthy and publication of his *factual* biography is without the statute's protection notwithstanding want of consent. On the other hand, the unauthorized and *intentionally fictionalized* publication constitutes the commercial exploitation of his personality, subject to statutory redress (pp. 10-11, maj. opin. in *Hill* case).

Appellants' "question presented" in their jurisdictional statement resorts to a hopeful and desired distinction between the fictional publication patently defamatory and that which on its face is non-defamatory. Apposite thereto, Mr. Justice Brennan in the *Hill* case perceptively illustrates the refinement between privacy and libel actions. Whereas it is true, that both actions *may* claim *damages* resulting from injury to reputation, in privacy cases, the "primary damage is the mental distress from having been exposed to public view" (p. 10, footnote, maj. opin., *Hill* case; see also Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093, 1124 (1962)).

Consequently, and again referring to *Spahn* as authoritatively illustrative, Mr. Justice Brennan comprehends that "the published matter *need not be defamatory,* on its face or otherwise, and *might even be laudatory* and still warrant recovery" (p. 10, footnote, maj. opin., *Hill* case; emphasis supplied).

D. *The Decision in* Time, Inc. v. Hill *Is Decisive and Controlling.*

The compelling conclusion reached from this Court's opinion in *Time, Inc.* v. *Hill, supra,* is that the New York privacy statute as construed by the New York courts, does not offend constitutional protections of press and speech.

CONCLUSION

This appeal does not present a substantial federal question and, accordingly, should be dismissed.

Respectfully submitted,

ARTHUR K. RADIN
Attorney for Appellee
6411 Landover Road
Cheuerly, Maryland

EARLE WARREN ZAIDINS
HARVEY J. MICHELMAN
STANLEY B. MICHELMAN
of Counsel

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 1 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,
Appellants,

v.

WARREN E. SPAHN,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN RESPONSE TO MOTION TO DISMISS

SELIG J. LEVITAN,
Attorney for Appellants,
630 Fifth Avenue,
New York, New York 10020.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1154

JULIAN MESSNER, INC., and MILTON J. SHAPIRO,
Appellants,

against

WARREN E. SPAHN,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN RESPONSE TO MOTION TO DISMISS

Appellee's motion to dismiss would deny the substantiality of the federal question presented by, first, incorrectly restating the question actually submitted as set forth in Appellants' Jurisdictional Statement, and, second, arguing that the record below establishes "knowing and reckless falsity", supporting that argument with arithmetic which does not withstand quantitative or qualitative scrutiny.

1. Appellee's brief (pp. 6, 9) misstates the question raised by Appellants in this appeal. In their Jurisdictional Statement, Appellants have not asserted that the New York statute is unconstitutional on its face. Such contention having been rejected in *Time, Inc.* v. *Hill,* Appellants argue, rather, the question of whether the court below applied the statute unconstitutionally in neither requiring proof nor making a finding of intentional or reckless falsification. This

question was not answered by *Time, Inc.* v. *Hill.* (See note 10 to Mr. Justice Brennan's opinion, 385 U. S. 374, 387, 17 L. Ed. 2d 456, 467).

2. In its decision below, the New York Court of Appeals expressly rejected the application to this case of the standard set forth in *New York Times Company* v. *Sullivan,* 376 U. S. 254, 11 L. Ed. 2d 686, holding, in effect, that proof of knowledge of falsity or of reckless disregard of the truth is not required except in the case of "a libel action brought by a *public official* against critics of his *official conduct*" (italics by the New York Court of Appeals). It is therefore evident that in reaching the decision here on appeal, the court below did not find the required proof of intentional or reckless falsification.

Fundamentally, Appellee's adding machine approach is irrelevant to the constitutional standard enunciated by this Court in *Hill.* By focusing on the biography's alleged "non-factual" elements and failing to distinguish inadvertent from malicious errors, Appellee pays mere lip service to *Hill's* limitation on the constitutional application of the statute.

Nonetheless our own attempt to calculate the number of sentences which Appellee *claims* to be untrue yields no figure even remotely approximating the percentage mentioned at page 8 of Appellee's brief. Using Appellee's computation of 2909 sentences, we find 1348 sentences unchallenged by Appellee, and more than half of the balance challenged because of their presentation in the form of dialogue which had "never existed or taken place" (Appellee's Supplemental Trial Bill of Particulars, p. 2), although at trial both sides stipulated that the dialogue was written to interpret what the author thought the facts were, "not to alter the essential situation", and that much of it was based on secondary sources (R. 75-76).

Our addition of the *claims* of "untruth" shows that in his Bill of Particulars and Supplemental Trial Bill of Particulars (constituting merely a detailed statement of Appellee's *claims,* New York Civil Practice Law and Rules,

Sec. 3041), approximately 26% of the total number of sentences were claimed by Appellee to be "untrue", Appellee's counsel having stated that he had labelled as "untrue" any sentence of which any part, however minor, was in his opinion untrue (R. 256).

But even more important than the quantity of claimed "untruths", is an examination of the quality and substantiality of the "untruths". The "untruthful" sentences in the book concerning which Appellee testified at the trial are listed in Appendix F to our Jurisdictional Statement. The Court will observe that Appellee labels as "untrue" a sentence which says a catcher "lumbered"; the truth, Appellee contended, was that the catcher "waddled" (Item 33, Appendix F). Labelled untrue is the statement in the book that crowds were "meager, apathetic", whereas Appellee testified that the crowds were "small", and were not apathetic (Item 46, Appendix F). Labelled untrue is the sentence stating that Appellee set to work with renewed determination; Appellee testified that he was determined to win from the beginning (Item 37, Appendix F). Labelled untrue is a statement that Spahn's pitching was wild, but that he gradually narrowed his "buckshot" pitches to the approximate limits of the strike zone; the truth, testified Appellee, was that he could pitch at least around the strike zone (Item 20, Appendix F). Qualitatively, we submit, the "untruths" are almost entirely if not all, insubstantial, trivial, inconsequential. It is significant that although Appellee's brief indulges in the unsubstantiated arithmetic, it does not contest at all the insubstantiality of the "untruths" as reflected in Appendix F to the Jurisdictional Statement.

Appellee, without any supporting citation to the record (for none exists), states (at page 10 of his brief) that "Undoubtedly the publisher shared with its author" what he calls the latter's "knowing and reckless falsity". His only support for claiming "knowing and reckless falsity" on the part of the publisher are (1) a comment by the trial judge that the fact that the author followed the customary

practice in creating dialogue based on secondary sources was not a good defense (a factual finding which, we think refutes the claim of wilful or reckless conduct); (2) the trial judge's statement that Appellants' book indicates a "careless disregard for the responsibility of the press" (an impermissible equating of "careless" with "reckless", *Time, Inc.* v. *Hill*, 385 U. S. at 389, 17 L. Ed. 2d at 467, *Garrison* v. *Louisiana*, 379 U. S. 64, 78, 13 L. Ed. 2d 125, 135); and (3) the reprinting of the book by the publisher after Appellee had commenced his law suit (but before the case came to trial). We respectfully submit that the mere commencement of the action was not equivalent to establishment of the validity of Appellee's claims, and did not require the publisher to cease publication of a work which it believed to be constitutionally privileged. Finally, it is impossible to ignore, as Appellee's brief does, the fact that the trial court refused on two occasions to award him exemplary damages and that the Appellate Division affirmed this refusal.

CONCLUSION

We respectfully submit that this appeal presents a substantial federal question and that the Motion to Dismiss should therefore be denied.

Respectfully submitted,

SELIG J. LEVITAN,
630 Fifth Avenue,
New York, N. Y. 10020,
Attorney for Appellants.

JOEL T. CAMCHE,
ELLIS B. LEVINE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

JULIAN MESSNER, INC. ET AL. *v.* SPAHN.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1154. Decided May 22, 1967.

PER CURIAM.

The motion of the Authors League of America, Inc., for leave to file a brief, as *amicus curiae*, is granted.

The judgment is vacated and the case is remanded to the Court of Appeals of New York for further consideration in light of *Time, Inc.* v. *Hill*, 385 U. S. 374.

THE CHIEF JUSTICE and MR. JUSTICE FORTAS would dismiss the appeal for want of a substantial federal question.